In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 457

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, a corporation; ROBERT BRIERLEY, HERBERT BEHLOW, and HOWARD T. FRY,
Petitioners,

vs.

HEAVY, HIGHWAY, BUILDING AND CONSTRUCTION TEAMSTERS COMMITTEE FOR NORTHERN CALIFORNIA, an unincorporated association; J. R. WARD, Chairman thereof; WESTERN CONFERENCE OF TEAMSTERS, an unincorporated association; EINAR MOHN, President thereof,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division Two

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division Two

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal,

State of California, First Appellate District, Division Two, rendered in the case of *Heavy, Highway Building & Construction Teamsters Committee for Northern California, et al. v. The Superior Court of the State of California in and for the City and County of San Francisco, Respondent; California Dump Truck Owners Association, a California corporation; Robert Brierley, Herbert Behlow, and Howard T. Fry, Real Parties in Interest,* Action No. 1 Civ. 20,483 in said court.

CITATIONS TO OPINION BELOW

The opinion of the District Court of Appeal, printed in Appendix B hereto, *infra,* page 47, is reported in 203 Advance California Appellate Reports 665, 21 Cal.Rptr. 840. The minute order of the California Supreme Court denying a review of the judgment is reported only in 58 Advance California Reports, Part 4, Minutes, page 4, and is printed in Appendix B hereto, *infra,* page 56.

JURISDICTION

The judgment of the District Court of Appeal was entered on May 16, 1962. A timely petition was filed for a hearing by the Supreme Court of the State of California, which had jurisdiction to review the judgment, but by order entered July 11, 1962, the Supreme Court denied the petition. By reason of such denial,

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the District Court of Appeal is the highest court of the State in which a decision can be had. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), since a right and privilege, i.e., to bargain collectively, and an immunity from state jurisdiction under state antitrust law, are specially set up and claimed by the respondents herein under a statute of the United States, namely, the National Labor Relations Act as Amended, 61 Stat. 136, 29 U.S.C. Sections 141, et seq.

QUESTION PRESENTED

Does the National Labor Relations Act as amended preclude a state court from adjudicating the applicability of state antitrust law to provisions in a collective bargaining agreement which require the employers to change the status of dump truck owner-operators, now serving them as regulated independent contractors, to employee-drivers when, from the facts, it is neither clear nor reasonably to be assumed that the owner-operators' status arguably concerns any lawful employee interest of present employee-drivers?

STATUTES INVOLVED

The statutory provisions involved are:

California Business and Professions Code Section 16600, and Sections 16700-16758, the California anti-

trust law (Cartwright Act), printed in Appendix A, *infra,* p. 27.

Sections 7 and 8 of the National Labor Relations Act, as amended, 29 U.S.C. 157 and 158, 61 Stat. 140, printed in Appendix A, *infra,* p. 35.

STATEMENT

The individual petitioners are owner-operators of dump truck equipment, separately engaged in business as highway carriers. They operate under regulation by the California Public Utilities Commission and subject to minimum transportation rates prescribed by the Commission pursuant to state law. (R., Pet. for Writ of Prohib., Exh. D, pp. 12-14; Appendix E, pp. 74-76.) Their businesses consist largely of the performance of transportation service as independent contractors for building and construction contractors, herein called "contractors", engaged in heavy construction work and highway building in the Northern California area. (R., id., Exh. D, pp. 16-18; Appendix E, pp. 78, 79.) The corporate petitioner is an association of highway carriers by dump truck which includes in its membership the individual petitioners and other owner-operators similarly engaged. (R., id., Exh. D, pp. 14 and 15; Appendix E, pp. 74, 75.)

Respondent Heavy, Highway, Building and Construction Teamsters Committee for Northern California ("Teamster Committee") is the collective bar-

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gaining representative of the teamster employees of the contractors. Respondent Western Conference of Teamsters is an association of local teamster unions, including the locals whose members are covered by the collective bargaining agreement.

The collective bargaining agreement, called "Teamsters Agreement" or "Master Agreement" (R., id., Exh. A), was made July 8, 1959 between the respondent Teamster Committee and Northern and Central California Chapter, The Associated General Contractors of America, Inc. ("A.G.C."), as collective bargaining representative of the contractors. The agreement applies to work performed by teamster employees of the contractors in Northern California. Section 24 purports to make an owner-operator driving his own truck on a contractor's work subject to the "applicable" terms and conditions of the agreement.

By a so-called Modifying Agreement dated October 27, 1960 (R., id., Exh. B), printed (as set forth in the Petition for Writ of Prohibition) in Appendix C, *infra*, page 58, Section 24 was amended to require that, except on jobs of less than five days duration, the owner-operator shall be carried on the payroll of the individual employer as a driver, subject to the individual employer's control in all details of the performance of the work, and subject to all terms and conditions of the Master Agreement except as otherwise provided. (Appendix C, pp. 58, 59, par. (C) and (D).) The Modifying Agreement is "derived

from" the owner-operator provisions in the collective bargaining agreement involved in *Local 24, International Brotherhood of Teamsters v. Oliver* (1959), 358 U.S. 283. (R., Pet. for Writ of Prohib., par. IX, p. 6; Appendix E, p. 106.)

The owner-operators are not parties to the Master Agreement nor the Modifying Agreement, nor were they represented by either the Teamster Committee, the A.G.C. or anyone else in the negotiations which preceded either of them. (R., id., Exh. D, pp. 18 and 19; Appendix D, pp. 79, 80.)

On January 27, 1961, petitioners commenced a state court action against respondents, the local teamster unions, and A.G.C. in the California Superior Court in San Francisco. It sought to enjoin enforcement of the Modifying Agreement as a violation of the state antitrust law (Calif. Bus. & Prof. Code, § 16600, and §§ 16700-16758, the "Cartwright Act"; Appendix A, p. 27) and to recover damages. The First Amended Complaint (as set forth in the Petition for Writ of Prohibition), printed in Appendix D, *infra,* page 65, alleged, in addition to the substance of the matters set forth above, that the primary purpose of the Modifying Agreement is, and that its effect would be, to restrict the business of transporting property as a highway carrier and prevent competition in the transportation of property for the contractors by forcing owner-operators to abandon their highway carrier businesses and to become servants and employees of the contractors, in violation of state antitrust law. (R., id., Exh. D, pp. 30-33; Appendix D,

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pp. 90-92.)[1] There are an estimated twenty-five hundred other highway carrier owner-operators who are affected by the Modifying Agreement in the same manner as petitioners. (R., id., Exh. D, p. 16; Appendix D, p. 78.)

All of the defendants, including A.G.C., demurred to the First Amended Complaint on the grounds that it fails to state a cause of action and the court has no jurisdiction over the subject matter of the action. (R., id., Exhs. E, F, G, and H; Appendix E, p. 107.) The principal authorities advanced in support of the demurrers were *Local 24, International Brotherhood of Teamsters v. Oliver,* above, and 362 U.S. 605. The Superior Court overruled the demurrers without opinion. (R., id., par. IX, p. 8; Appendix E, p. 108.)

Thereupon, on February 13, 1962, respondents filed in the California Supreme Court a petition for a writ of prohibition to restrain the Superior Court from proceeding further. (R., Pet. for Writ of Prohib.) The petition, printed in Appendix E, *infra,* page 101 (omitting attached exhibits), incorporated the First Amended Complaint, the Master Agreement and the Modifying Agreement. It challenged the jurisdiction of the Superior Court on the ground that the Modifying Agreement "is substantially identical with the same provision which was before the United States Supreme Court in *Local 24, Teamsters*

[1]Pursuant to an unfiled stipulation between the parties to the Superior Court action, enforcement of the Modifying Agreement was suspended pending trial of the case on the merits. The stipulation has now expired.

v. Oliver, 358 U.S. 283, and 362 U.S. 605" (R., id., p. 6; Appendix E, p. 106), is the product of the exercise of rights granted and protected by Sections 7 and 8 of the National Labor Relations Act as Amended (R., id., p. 4; Appendix E, p. 104), and ". . . *on the face of the First Amended Complaint,* the Court is without jurisdiction to hear and determine the matters presented by the First Amended Complaint." (R., id., p. 8; Appendix E, p. 108.) (Emphasis added.)

The petition did not expressly or directly controvert the allegation of the First Amended Complaint that the purpose of the Modifying Agreement is to restrict trade, nor did it allege any other purpose of the Modifying Agreement. No facts were set forth by reason of which the employment of owner-operators as employees rather than independent contractors would in any way further the interests of the contractors' employee-drivers. It merely stated the conclusion of law that the Modifying Agreement is the product of the exercise of rights under Sections 7 and 8.

The Supreme Court ordered the proceeding transferred to the District Court of Appeal. (R., Supreme Court's order of February 15, 1962.) By order of the latter court, an Alternative Writ of Prohibition was issued on March 9, 1962. (R., Alternative Writ of Prohibition.)

As the real parties in interest, petitioners filed an Answer and Return to the Alternative Writ. It denied that the Modifying Agreement is within the scope of collective bargaining required or protected under the Act and denied the other material allega-

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tions of the Complaint. (R., Answer and Return, pars. IV, VII, IX, pp. 7, 10, 15, 23, 26-29.)

The District Court of Appeal on May 16, 1962, having before it only the facts set forth in the First Amended Complaint, the Petition for Writ of Prohibition and exhibits, and the Answer and Return of Real Parties in Interest, and averred in a declaration made a part of the Return, issued its judgment ordering issuance of a peremptory writ of prohibition, review of which is here sought. (Appendix B, p. 47.)

The opinion of the District Court of Appeal states that the question presented is "whether the fact that the contract provision relating to owner-operators was contained in an agreement which was the fruit of the exercise of collective bargaining rights under the National Labor Relations Act precludes the respondent Superior Court from applying the Cartwright Act to prohibit application of the owner-operator provision to the real parties in interest." (Appendix B, p. 49.) It regarded the *Oliver* cases as deciding this question affirmatively "in an almost identical fact situation." (Appendix B, p. 49.) It deemed the Modifying Agreement to be "indistinguishable" from the provisions in the *Oliver* case, and "(t)hus, as the subject matter of the contract concerns wages, hours and other terms and conditions of employment upon which federal law directs the parties to bargain" (Appendix B, p. 54), it held that the Superior Court "has no jurisdiction to consider the cause" before it, citing *San Diego Building Trades Council v. Garmon,* 359 U.S. 236. (Appendix B, p. 54.)

Petitioners sought a hearing in the California Supreme Court on the grounds that the conclusion that the provisions concern wages, hours and terms and conditions of employment is erroneous, and that it is a question of fact within state jurisdiction to decide whether the combination between the association of employers and the union was entered into to obtain a valid labor objective or to restrain trade for other purposes. The Supreme Court denied the petition, Justice Traynor being of the opinion it should be granted. (R., Supreme Court's order of July 11, 1962.)

The issue involved is not moot for the reasons stated in the opinion of the District Court of Appeal. (Appendix B, p. 55.)

It is not disputed that the business of the contractors affects "commerce." (R., Pet. for Writ of Prohib., pp. 3, 6; Appendix E, pp. 103, 106.)

None of the parties has ever asserted or suggested that the Modifying Agreement involves any unfair labor practice under Section 8 of the Act.

REASONS FOR GRANTING THE WRIT

1. The conclusion of the California court that the Modifying Agreement concerns wages, hours and other terms and conditions of employment was reached without a single fact before the court to support it, directly or inferentially, and with no other basis for assuming it than the inclusion of the provisions in the

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collective bargaining agreement and their verbal similarity to the provisions in the *Oliver* case. The conclusion thus reached is not in accord with the *Oliver* decisions.

The principle of the second *Oliver* decision (362 U.S. 605) is inapplicable to the Modifying Agreement. The agreement there—that the employers shall use their own available equipment before hiring extra equipment—was "bound up" with wages and other bargaining objectives of the employers' drivers because it prevented withdrawal of work from them. (Cf. *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 518; *Oliver*, 358 U.S. at 295.) The instant provisions serve no comparable purpose. They do not in any way limit or discourage the use of owner-operators, to retain work for present employees; they simply require that the owner-operators be hired as employees rather than as independent contractors. The volume of work available for existing employees is not affected.

Neither is the decision below consistent with the first *Oliver* decision where this court held, as to the owner-operator provision there in question, that "the point of the Article obviously is not price fixing but wages". (358 U.S. at 294.) The Ohio owner-operators, unlike these in California, were wage-earning employees to begin with, who leased their equipment as an incident of their employment. This Court declared that the establishment of minimum rentals to be paid to them by their employer-lessees was relevant to collective bargaining rights under the Act because an

inadequate rental, which would oblige an owner-driver to make up from his driver wages the deficiency in actual operating costs, would diminish his wages and tend to undermine the negotiated wage scale. Drivers of employer-owned equipment in the same bargaining unit had a direct and legitimate concern because progressive curtailment of jobs was threatened through withdrawal of more and more employer-owned vehicles from service. (358 U.S. at 294.)

This relevance so described in the *Oliver* case was not a mere inference from the terms of the Article and its inclusion in a collective bargaining agreement. It was based "on the evidence" (358 U.S. at 294) of the Article's history and purpose as developed in trial before the Ohio Court—evidence of two decades of controversy over the terms of the owner-operators' employment, the nub of which was the union's position that the employers were abusing the leasing practice and using it to break down the wage structure. From these facts, so established, came the factual conclusion that the Article was "a direct frontal attack upon a problem" (358 U.S. at 294) which was a subject of mandatory collective bargaining.

The present case is devoid of corresponding facts. It is neither alleged nor implied that it is prejudicial or adverse to the wages or jobs of employed drivers in any way for the contractors to use the owner-operators as self-employed independent contractors, or that the forced conversion of the owner-operators to the status of employees would further any interests of the employees within the scope of the Act. It does not appear that there is any history or condition, ex-

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isting or threatened, of significant transfers from employee-driver to owner-operator status, or that there has ever been any controversy over owner-operators between the contractors and the unions.[2] Clearly the existence of such facts is not to be inferred either because the Modifying Agreement is embodied in the collective bargaining agreement or because much of its text is copied from the *Oliver* owner-operator clauses.

Lacking reasonable factual basis even for inference that the Modifying Agreement has any relationship to a subject of required or protected collective bargaining, there is no basis in reason or the decisions of this Court for holding that state power or jurisdiction is superseded.

2. The question whether the Modifying Agreement concerns wages and conditions of employment is linked up with and a part of the broader issue presented by respondents' challenge to the jurisdiction of the Superior Court: whether the objective of the employer-union combination was to advance or protect rights or interests of the contractors' employees, or to restrain trade for unrelated purposes. It was by trial and adjudication of this issue in the *Oliver* case that relevance of minimum equipment rentals to a subject of mandatory collective bargaining was determined. This issue of purpose and objective is not one for determination by the National Labor Relations Board and the decision below denies petitioners any

[2]The absence of controversy is suggested by the fact that A.G.C. joined the unions in opposition to the First Amended Complaint. (R., Pet. for Writ of Prohib., Exh. H.)

opportunity to litigate it. The decision forecloses petitioners from any remedy.

As a technical matter of pleading respondents' bare legal conclusion that the Modifying Agreement was made "in the exercise of rights granted by Section 7 . . . and protected and regulated by Sections 8(a)(5), 8(b)(3), and 8(d) . . ." (R., Pet. for Writ of Prohib., p. 4; Appendix E, p. 104) is not a denial that the purpose of the Modifying Agreement was to restrict and diminish the business of transporting property as a highway carrier nor an allegation that the purpose was to further or protect rights or interests of employee drivers. That, however, was the intendment of the petition, for without any other such allegation in their pleading, respondents went outside the record to argue both in the District Court of Appeal and the California Supreme Court, and they may be expected to do likewise here, that the California Public Utilities Commission's regulation of highway carriers by dump truck is so ineffectual and inadequate that the operations of the owner-operators as self-employed carriers endangers the wages, hours and terms and conditions of employment of employee-drivers. They have asserted, for example, that the prescribed minimum transportation rates do not take into consideration certain overtime expense under the wage scale and a number of other elements of labor cost, nor protect fringe labor benefits or working conditions; that the regulation is inapplicable to off-highway operations; and they have criticized certain other features of the Commission's regulation, which really are irrelevant to owner-operator service for

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contractors but pertain to their operations as "sub-haulers" for other carriers. It is respondents' claim, in effect, that these asserted regulatory defects make it more economical for the contractors to use owner-operators than to operate their own employee-driven equipment and that the purpose of the Modifying Agreement is to protect the employee-drivers against such economic disadvantage.

In a trial petitioners would sharply dispute these assertions. They would dispute in particular that such is the true and genuine purpose of the Modifying Agreement. The issue requires a trial in which respondents can attempt to substantiate their assertions. It requires a trial in which petitioners may have an opportunity to present evidence that the prescribed minimum rates do cover the full labor and other costs of dump truck operation; that the Commission's regulation is not subject to limitations and deficiencies which threaten employee-drivers' wages or working conditions but functions, as intended by the legislature, to prevent destructive competitive practices both between carriers and between carriers and private equipment operators;[3] that the exempt off-highway operations are inconsequential; and that the true

[3]There was no governmental regulation of the Ohio owner-operators' equipment-rental rates, which were therefore open to manipulation as charged by the union. This was material to the *Oliver* decision, for this Court declared that ". . . the Ohio courts did not give proper significance to . . . the adverse effects upon the negotiated wage scale which might result *when the rental for the use of the leased vehicle was unregulated* . . ." (358 U.S. at 293.) (Emphasis added.) The Public Utilities Commission's comprehensive regulation of the rates and operations of the California owner-operators is in conspicuous contrast to the Ohio situation and warrants question as to respondents' asserted justification for the Modification Agreement.

objective of the parties in reducing the owner-operators to the status of employees has nothing to do with any subject of collective bargaining under the Act but rather is concerned with extraneous purposes, including, on the part of the contractors, to remove them from the scope of the Public Utilities Commission's minimum rate regulation[4] and, on the part of the unions, to place the owner-operators in a position which will enable the unions to derive revenue from them.

Thus the all-important and controlling question of relevance of the agreement to a subject of collective bargaining under the Act does not stand alone but is ancillary to the larger issue of purpose and objective. This issue was not considered by the California court at all and it could not be considered in the absence of the facts. No machinery for getting such a controversy as this before the National Labor Relations Board is provided in the Act. Plainly it is not an issue which has been entrusted to the Board to decide. The decision below deprives petitioners of any trial or hearing of this issue.

3. Neither the *Oliver* cases nor the *Garmon* case (*San Diego Building Trades Council v. Garmon*, 359

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[4]The equipment rental rates established by the *Oliver* Article were the central feature of that agreement, whereas here the Modifying Agreement provides, as to equipment compensation, merely that it "shall be set by agreement between the individual employer and the owner-operator at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Agreement". (Appendix C, p. 61, par. (J).)

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U.S. 236) held or requires a holding that the Act deprives state courts of jurisdiction to determine the issue as to the objective of the agreement.

In the *Oliver* case the Ohio court *did* exercise jurisdiction to determine the purpose of the agreement before it. It held that the Article was unlawful price fixing and only an indirect and remote approach to wages. This Court reversed, not because the jurisdiction was exercised, but because, on the evidence taken in the exercise of jurisdiction, this Court held that the state decision was erroneous, that the point of the Article was not price fixing but wages. The actual decision of this Court was that, federal law being paramount in that area, "inconsistent *application* of state law is necessarily outside the *power* of the state". (358 U.S. at 296.) (Emphasis added.) State power to frustrate the policy of federal law was denied, not state jurisdiction to adjudicate whether, on the facts, the agreement arguably was or was not directed towards a subject of federally-protected or required collective bargaining.[5]

The *Garmon* case, also relied on by the District Court of Appeal, did deal with preemption of state jurisdiction to adjudicate, although not with any anti-trust issue. The state judgment there awarded an employer damages against a union for picketing his

[5]The language in the *Oliver* opinion, quoted at length in the opinion of the District Court of Appeal (Appendix B, pp. 50-53) did not deal with the question on which the District Court of Appeal used it, i.e., whether or not the article dealt with a subject matter within the scope of collective bargaining. It dealt entirely with this Court's second point, the absence of state power to interfere with federal policy.

premises "based on the assumption that the behavior of the petitioner unions constituted an unfair labor practice" (359 U.S. at 245) prohibited under Section 8(b)(2). The board had declined to act in the controversy because its monetary jurisdictional standards were not met. There was no dispute that an issue as to the violation existed. The facts clearly presented the question. Because the question was within the competence of the board to decide, state jurisdiction was required to yield to avert danger of state conflict with national labor policy. The decision, the Court said, was not one for even it to make. (359 U.S. at 246.)

> "What is outside the scope of this court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board." (359 U.S. at 245.)

In contrast to the *Garmon* case, however, this case at the present stage of the litigation is not one in which it is clear or fairly to be assumed that the unions' participation in the combination with the employers is activity protected under Section 7. It is not yet even arguable that it is so protected because of the complete absence from the record of any facts which even arguably relate the owner-operators' status to wages, hours or terms or conditions of employment of employed drivers or any other subject of protected collective bargaining. Whether or not any such facts exist can only be determined upon a trial of the issue as to the purpose and objective of the Modifying

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Agreement. That is not a determination within the jurisdiction of the board to make. Neither is it one which is outside the scope of this Court's authority, for it is precisely the determination which this Court did make in the *Oliver* case. Denial of the Superior Court's jurisdiction to try this issue, therefore, finds no support in either *Oliver* or *Garmon*.

Weber v. Anheuser-Busch, Inc. (348 U.S. 468) should also be mentioned because of its holding that an employer's remedy against picketing as a violation of state antitrust law was superseded in the absence of a determination by the board whether the Act provided a remedy against it as an unfair labor practice. That decision, of course, is inapplicable here because, as stated above, no question of any unfair labor practice has been raised by any party and none appears from the facts pleaded. In the *Weber* case too, as in *Garmon,* the facts immediately reasonably showed an activity prohibited by Section 8; showed it so clearly, in fact, that the employer itself alleged an unfair labor practice both in a charge filed with the board and in its complaint in the state court, later amended to allege the antitrust violation.

Thus none of these cases holds that when, from the facts, it is neither clear nor reasonably to be assumed that a union-employer contract concerns a proper subject of collective bargaining, a state court is precluded from adjudicating, either directly or incidentally to some other determination, whether or not such relationship arguably exists. We find no decision of this Court which denies jurisdiction to do so. The implica-

tion of the cases, read in the light of the obvious need of a forum for the trial of that issue, would seem to be to the contrary.

No danger of state conflict or potential interference with the National Labor Relations Act as amended would result from exercise of the jurisdiction which the decision below forbids. Nothing in the Act protects or prohibits the combination of a union and a group of employers to restrict trade and commerce by destroying a class of self-employed businessmen and converting its members to employee status for purposes unrelated to rights or interests protected under the Act. A state decision that such is the purpose and effect of the Modifying Agreement and enjoining its enforcement would not control or touch any activity subject or potentially subject to federal labor regulation, or present any danger of conflict with national legislation; and the state antitrust remedy would neither parallel any remedy granted under the national policy nor grant any remedy withheld under that policy. If, after exercise of state jurisdiction, the state decision was found to be erroneous, as in the *Oliver* case, that case itself demonstrates that the integrity of federal labor policy and its administration has protection against inconsistent application of state power. On the other hand, if the state decision were adverse to petitioners, the adjudication that the *objective* of the agreement was to protect or improve employees' wages or conditions of employment would amount to no more than a determination that the activity was arguably protected

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under Section 7, and would create no possibility of conflict with any board decision.

4. The decision below is in direct conflict with the decision of the Seventh Circuit Court of Appeals in *Jewel Tea Co., Inc. v. Local Unions, Etc., Amalgamated Meat Cutters & Butcher Workmen of North America* (1960), 274 F. 2d 217; certiorari denied, *Local Unions, Etc., Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co., Inc.*, 362 U.S. 936. There a provision in a collective bargaining agreement between labor unions and a trade association of food stores prohibited the sale of meats after 6:00 p.m. It was attacked by a chain-store operator as a combination and conspiracy in restraint of trade violating the Sherman Act.[6] The unions moved to dismiss the complaint on the authority of the first *Oliver* decision, contending that marketing hours are so intimately connected with hours of employment as necessarily to place the provision within the exclusive regulatory scope of the National Labor Relations Act. The District Court denied the motion, and the Circuit Court affirmed. It held that fixing marketing hours is a proprietary right to which the rights of labor under the National Labor Relations Act do not attach; that ". . . if any effort is made by labor to infringe the rights of the employer in (this field), it is not shielded from the

[6]It is immaterial that the case involved an alleged Sherman Act rather than a state antitrust violation because, as this Court indicated in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. at 479, when exclusive primary board jurisdiction exists, it supersedes antitrust jurisdiction of federal as well as state courts.

sword of the antitrust laws"; and that ". . . the laws of free competition may not be thwarted by a combination of employers and unions who conspire to prevent commercial development". (274 F. 2d at 221.) The *Oliver* decision was distinguished as "carefully qualified" by the statement of this Court that the "objective" there was "to protect the negotiated wage scale" and ". . . to protect lawful employee interests against what is believed, rightly or wrongly, to be a 'scheme or device . . .' " to evade union wages and union working conditions. (274 F. 2d at 221, quoting from 358 U.S. at 293.) The Court further said:

> "Although exercise of an employer's proprietary right to establish marketing hours may incidentally affect its employees, as will almost anything it does, it can hardly be argued that such action is a 'direct frontal attack' upon or even a 'remote and indirect approach' to the subject of the basic work day. It is conceivable that maintenance of meat markets during evening hours will create even more jobs for union employees." (274 F. 2d at 221.)

Thus, in ordering the cause "remanded for further proceedings not inconsistent with the views herein expressed" (274 F. 2d at 224), the Seventh Circuit Court of Appeals affirmed to the District Court jurisdiction to decide the same issue as to objective and purpose which the California court in the decision below denied that the Superior Court has in the instant case.

5. The question presented has general importance on the relation between federal policy under the

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National Labor Relations Act as amended and antitrust jurisdiction of both state and federal courts, and is of direct importance in the business lives of some twenty-five hundred dump truck operators in California.

The necessity imposed upon these operators of renouncing the independent status which their initiative and effort has achieved and of accepting the supervision and direction to which they would be subject as employees, is in itself a matter of sufficient concern to warrant the Court's attention.

The importance of the question generally is also compelling. Antitrust cases, both state and federal, involving agreements or other combined action of business groups and labor unions are by no means uncommon. Often the question arises in such cases whether the union activity is protected or prohibited under the Act.

When it is a question of an unfair labor practice especially, as in *Weber v. Anheuser-Busch, Inc.*, above, the facts may well make it reasonably clear immediately that the controversy is within the exclusive jurisdiction of the board and that state jurisdiction is preempted. There unquestionably are many other cases, however, such as the instant one, the *Oliver* case, and the *Jewel Tea* case, in which no unfair labor practice appears to be involved and in which, before it can be seen whether the union's activity arguably is protected under Section 7, a factual determination of a collateral or preliminary nature must be made, requiring a trial and introduction of evidence.

Two other California cases in which the purpose or objective of the activity was such an issue may be cited as illustrative: *Alpha Beta Food Markets, Inc. v. Amalgamated Meat Cutters and Butcher Workmen of America,* (1956) 147 Cal. App. 2d 343, 351, 305 P. 2d 163, 168; and *Alfred M. Lewis, Inc. v. Warehousemen, Teamsters, Chauffeurs and Helpers Local Union Number 542,* (1958) 163 Cal. App. 2d 771, 785, 330 P. 2d 53, 61. Another such issue is whether the organization claiming protection for its activities is composed of employees or of independent contractors who do not qualify for union organization, as in *Braddick v. Federation of Shorthand Reporters,* (1953, S.D.N.Y.) 115 F.S. 550, 553; *United States v. United Scenic Artists, Local 829 Brotherhood of Painters, Decorators and Paperhangers of America,* (1961, S.D.N.Y.) (not officially reported) 42 Labor Cases par. 16956, at pp. 24487, 24490; and *United States v. Fish Smokers Trade Council, Inc.,* (1960, S.D.N.Y.) 183 F.S. 227.

Heretofore courts have not hesitated to hear and decide such issues. The judgment of the District Court of Appeal denying jurisdiction to do so in this case, casts doubt on the jurisdiction of courts generally to continue to make such decisions. The question, we believe, has never been directly decided by this Court. Its determination of the question now would be in the public interest.

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CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
September 20, 1962.

Respectfully submitted,

ROBERT M. ADAMS, JR.,
SCOTT ELDER,
PEMBROKE GOCHNAUER,
SAMUEL L. HOLMES,
Counsel for Petitioners.

(Appendices A, B, C, D and E Follow)

Appendix A

STATUTORY PROVISIONS CITED

1. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 16600 AND SECTIONS 16700-16758 (CARTWRIGHT ACT).

§ 16600. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extend void.

§ 16700. The provisions of this chapter are cumulative of each other and of any other provision of law relating to the same subject in effect May 22, 1907.

§ 16701. Section 24 of this code shall not determine the separability of the provisions of this chapter, one from another. Such separability shall be determined by whether the provisions of Chapter 530 of the Statutes of 1907 and the provisions of Chapter 362 of the Statutes of 1909 are separable among themselves and as to each other.

If the words "or reduce" (following the word "increase") were not effectively deleted from Subdivision 2 of Section 1 of Chapter 530 of the Statutes of 1907 by Section 1 of Chapter 362 of the Statutes of 1909, a combination of capital, skill or acts by two or more persons for the purpose of reducing the price of merchandise or of any commodity is a trust.

§ 16702. As used in this chapter "person" or "persons" includes corporations, firms, partnerships and associations existing under or authorized by the laws

of this State or any other State, or any foreign country.

§ 16703. Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity.

§ 16720. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

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(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

§ 16721. It is unlawful for any person, or his agent, to issue or to own trust certificates, or for any person or his agent, officer, or employee, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or with any stockholder or director of a corporation, the purpose and effect of which is to place the management or control of the combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

Any person who enters into any such combination, contract or agreement which violates this section is guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not less than fifty dollars ($50), nor more than five thousand dollars ($5,000).

§ 16722. Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity.

§ 16723. No agreement, combination or association is unlawful or within the provisions of this chapter, the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed.

§ 16724. It is not unlawful, or within the provisions of this chapter, for persons engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation which has as its object or purpose the transportation, marketing or delivery of such commodity.

§ 16725. It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

§ 16726. Except as provided in this chapter, every trust is unlawful, against public policy and void.

§ 16727. It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in

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the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State. (Added Stats.1961, c. 738, p. ....., § 1.)

§ 16750. (a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys fee together with the costs of suit.

The amendments to this section adopted at the 1959 Regular Session of the Legislature do not apply to any action commenced prior to September 18, 1959.

(b) The State and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section.

(c) The Attorney General may bring an action on behalf of the State or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law, provided that the Attorney General shall notify in writing any political subdivision

or public agency of his intention to bring any such action on its behalf, and at any time within 30 days thereafter, such political subdivision or public agency may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the Attorney General to bring the intended action. (As amended Stats. 1959, c. 2078, p. 4811, § 1; Stats.1961, c. 1023, p. ....., § 1.)

§ 16751. Whenever it appears to the court before which any proceedings under this chapter are pending that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside in the county where such action is pending.

§ 16752. Upon a violation of this chapter by any corporation or association the Attorney General or the district attorney of the proper county may institute proper proceedings in a court of competent jurisdiction for the forfeiture of charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the corporation or association. (As amended Stats.1959, c. 2079, p. 4812, § 1.)

§ 16753. Every foreign corporation or association, exercising any of the powers, franchises or functions of a corporation in this State, which violates this chapter, is subject to revocation of those powers, franchises or functions and upon such revocation is prohibited from doing any business in this State. The Attorney General may enforce this provision by

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ringing proper proceedings by injunction or other-
ise. Upon receipt of a certified copy of the judg-
ent and decree of any court of competent jurisdic-
ion finding any foreign corporation or association
uilty of violating this chapter and ordering a revo-
ation of its powers, franchises or functions of a cor-
oration in this State, the Secretary of State shall
evoke the license of any such corporation or asso-
iation heretofore authorized to do business in this
tate. (As amended, Stats.1959, c. 2079, p. 4812, § 2.)

§ 16754. The Attorney General, or the district at-
orney of any county on the order of the Attorney
eneral, shall initiate civil actions or criminal pro-
eedings for violation of this chapter. Civil actions
nd criminal proceedings for violation of this chapter
nitiated by the Attorney General or on his order may
e brought in the superior court in and for any
ounty where the offense or any part thereof is com-
itted or where any of the offenders reside or where
ny corporate defendant does business. (As amended
tats.1961, c. 757, p....., § 1.)

§ 16754.5. In any civil action brought by the State
nder this chapter, the court may, in addition to
ranting such prohibitory injunctions and other re-
raints as it may deem expedient to deter the defend-
nt from, and insure against, his committing a future
olation of this chapter, grant such mandatory in-
nctions as may be reasonably necessary to restore
nd preserve fair competition in the trade or com-
erce affected by the violation. (Added Stats.1961,
797, p. ....., § 1.)

§ 16755. (a) Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable by a fine of not less than fifty dollars ($50) nor more than five thousand dollars ($5,000), or by imprisonment for not less than six months nor more than one year, or by both such fine and imprisonment.

(b) Each day's violation of this chapter is a separate offense.

§ 16756. In any indictment, information or complaint for any offense named in this chapter, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created.

§ 16757. (a) In prosecutions under this chapter, it is sufficient to prove that a trust or combination exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

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(b) The character of the trust or combination alleged may be established by proof of its general reputation as such.

§ 16758. In any action or proceeding brought by the Attorney General or any district attorney for the violation of this chapter no person shall be excused from attending, testifying or producing books, papers, or documents in obedience to subpena or under order of court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty.

No individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence in any action or proceeding brought by the Attorney General or a district attorney under this chapter.

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2. NATIONAL LABOR RELATIONS ACT, AS AMENDED, SECTIONS 7 AND 8 (29 U.S.C. SECS. 157, 158).

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be

affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

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whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or em-

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ployer organization or to enter into any agreement which is prohibited by section 8 (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in

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the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which were not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act,

(B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such pick-

eting: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obliga-

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tion of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the

State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into

any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an em-

ployer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

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Appendix B

OPINION AND JUDGMENT BELOW AND ORDER OF STATE SUPREME COURT DENYING HEARING.

Vol. 203 A.C.A. 665)

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Civil No. 20,483

Heavy, Highway Building & Construction Teamsters Committee for Northern California, et al.,
Petitioners,

vs.

The Superior Court of the State of California, in and for the City and County of San Francisco,
Respondent,

California Dump Truck Owners Association, et al.,
Real Parties in Interest.

OPINION

Petitioners, the Heavy, Highway Building & Construction Teamsters Committee for Northern Cali-

fornia, and the Western Conference of Teamsters, on behalf of their affiliated local unions, seek a writ of prohibition to restrain the respondent court from hearing action No. 507496, instituted by California Dump Truck Owners Association, an association of owner-operators, the real parties in interest, to enjoin the enforcement of certain provisions of a 1959 collective bargaining agreement between the union and the A.G.C., an association of contractors in the highway and construction industry in northern California. All members of the A.G.C. are employers engaged in interstate commerce within the meaning of the National Labor Relations Act. (61 Stat. 140, 29 U.S.C.A. § 141 et seq.)

The specific provision relating to owner-operators, adopted on July 27, 1961, pursuant to the modification clause of the collective bargaining agreement, prescribed the terms and conditions which regulated the terms under which an owner-operator drove his equipment for an individual employer in the performance of work covered by the collective bargaining agreement.

The complaint of the real parties in interest alleged that the owner-operators were not parties to the collective bargaining agreement but were individuals and an association of individuals who owned dump trucks and drove themselves for the performance of transportation services, under a permit and regulation by the California Public Utilities Commission; that the owner-operator clause unlawfully interfered with their freedom to carry on business and consti-

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tuted a violation of the Cartwright Act. Petitioners demurred to the complaint on the ground that the respondent court did not have jurisdiction over the subject matter as the provision of the contract relates to a right protected by the National Labor Relations Act. Petitioner's demurrer was overruled without opinion on October 20, 1961, and the petition for the writ ensued.

The question is whether the fact that the contract provision relating to owner-operators was contained in an agreement which was the fruit of the exercise of collective bargaining rights under the National Labor Relations Act precludes the respondent superior court from applying the Cartwright Act to prohibit application of the owner-operator provision to the real parties in interest.

It is well settled that where the trial court has determined that it had jurisdiction, prohibition will lie to prevent exercise thereof when jurisdiction is challenged in that court by demurrer, motion, plea or other objection of some kind (*Harden v. Superior Court,* 44 Cal.2d 630-634 [284 P.2d 9]). The writ is a necessary and proper method of obtaining relief under the circumstances (*Tide Water Assoc. Oil Co. v. Superior Court,* 43 Cal.2d 815-820 [279 P.2d 35]).

The question here presented was recently decided by the United States Supreme Court in an almost identical fact situation in *International Brotherhood of Teamsters v. Oliver,* 358 U.S. 283 [79 S.Ct. 297, 3 L.Ed.2d 312], and *International Brotherhood of Teamsters v. Oliver,* 362 U.S. 605 [80 S.Ct. 923, 4

L.Ed.2d 987]. In the *Oliver* case, an owner-operator who leased and drove his vehicle in the service of an interstate carrier, challenged the validity of a substantially identical contract provision under the Ohio Antitrust Law. The court determined that the purpose of the owner-operator provision was not price fixing but wages and that (at pp. 294-297): "The regulations embody not the 'remote and indirect approach to the subject of wages' perceived by the Court of Common Pleas but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. *Cf. Bakery & Pastry Drivers etc. Local v. Wohl,* 315 U.S. 769, 771 [62 S.Ct. 816, 86 L.Ed. 1178].

". . . . . .

"The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301

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U.S. 1, 45 [57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352]; *National Labor Relations Board v. American National Ins. Co.*, 343 U.S. 395, 401-402 [72 S.Ct. 824, 96 L.Ed. 1027]. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. *Cf. Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 [63 S.Ct. 420, 87 L.Ed. 571]. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 [77 S.Ct. 912, 1 L.Ed.2d 972]; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, see *Allen Bradley Co. v. Local Union etc. Electrical Workers*, 325 U.S. 797 [65 S.Ct. 1533, 89 L.Ed. 1939]; *cf. United States v. Employing Plasterers Assn.*, 347 U.S. 186, 190 [74 S.Ct. 452, 98 L.Ed. 618]. We believe that there is no room in this scheme for the application here of this

state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. *Cf. State of California v. Taylor,* 353 U.S. 553, 566-567 [77 S.Ct. 1037, 1 L.Ed.2d 1034]. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill v. State of Florida,* 325 U.S. 538, 542-544 [65 S.Ct. 1373, 89 L.Ed. 1782]. *Cf. International Union v. O'Brien,* 339 U.S. 454, 457 [70 S.Ct. 781, 94 L.Ed. 978]; *Amalgamated Assn. of Street etc. Employees v. Wisconsin Employment Relations Board,* 340 U.S. 383 [71 S.Ct. 359, 95 L.Ed. 364, 22 A.L.R.2d 874]; *Plankinton Packing Co. v. Wisconsin Employment Relations Board,* 338 U.S. 953 [70 S.Ct. 491, 94 L.Ed. 588]. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. *Cf. Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,* 336 U.S. 301, 307-312 [69 S.Ct. 584, 93 L.Ed. 691]. Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See *Railway Employes' Dept. v. Hanson,* 351 U.S. 225, 232 [76 S.Ct. 714, 100 L.Ed. 1112]. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an anti-trust law. '. . . Congress has sufficiently expressed its purpose to . . . exclude state prohibition, even though that with which the federal law is concerned

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as a matter of labor relations be related by the State to the more inclusive area of restraint of trade.' *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481 [75 S.Ct. 480, 99 L.Ed. 546]. *We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it.*" (Emphasis supplied.)

The owner-operators in the instant case, of course, contend that their case is distinguishable from the *Oliver* case because the subject matter of the contract affects their status as individual businessmen as it compels them to become employees of the contractors when they drive trucks for them and that as individual contractors, they are exempt from the act and that they cannot be made a party to a collective bargaining agreement. However, the identical argument was raised by the plaintiff Oliver in the *Ohio* case, *supra*. As indicated, the *Oliver* case necessarily implies that Oliver's status was immaterial and that the real issue was the subject matter of the collective bargaining agreement.

Furthermore, in the subsequent decision in the *Oliver* case at 362 U.S. 605, the Supreme Court com-

mented that on remand the Ohio court set aside the prior order as applied to Oliver as a lessor-driver but continued the provision order in full force and effect as it applied to Oliver as lessor-owner and employer of drivers of his equipment, the Ohio court holding that the Supreme Court decision did not preclude an injunction against enforcement of the clause insofar as it required the carriers to use their own equipment and employees before hiring extra equipment. The Supreme Court held in *International Brotherhood of Teamsters v. Oliver,* 362 U.S. 605 [80 S.Ct. 923, 4 L.Ed.2d 987] that the applicable provisions are ". . . at least as intimately bound up with the subject of wages as the minimum rental provisions we passed on then. Accordingly, as in the previous case, we hold that Ohio's antitrust law here may not 'be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain.' " (At p. 606.)

The owner-operator clause in the present case cannot be distinguished from that in the *Oliver* case. Thus, as the subject matter of the contract concerns wages, hours and other terms and conditions of employment upon which federal law directs the parties to bargain, the respondent court has no jurisdiction to consider the cause. (*San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244 [79 S.Ct. 773, 3 L.Ed.2d 775]; *Calise v. Superior Court,* 159 Cal. App.2d 126, 132 [323 P.2d 859].) The subject matter of the controversy is one which the United States

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Supreme Court has determined is in the area of exclusive federal jurisdiction.

While the record indicates that the collective bargaining agreement was to expire on April 30, 1962, we are satisfied we should not treat the question as moot. The question presented is one of continuing importance to the parties in their negotiations of future contracts. This is not a situation in which the parties are no longer interested in the legal issue involved. No purpose but delay would be served by treating the question as moot and the public interest in the orderly process of collective bargaining negotiations and in the orderly administration of justice compels a determination now (*DiGiorgio Fruit Corp. v. Department of Employment,* 56 Cal.2d 54 at 58-59 [13 Cal.Rptr. 663, 362 P.2d 487]). As a practical matter, this judgment has a direct bearing on the owner-operator provision in any new contract.

In view of the foregoing, it is ordered that a peremptory writ of prohibition issue forthwith, restraining the respondent court from hearing or taking any proceedings in superior court action No. 507496.

Kaufman, P. J.

Shoemaker, J., and Agee, J., concurred.

Filed May 16, 1962,
Lawrence R. Elkington, Clerk.

Order Due July 13, 1962

ORDER DENYING HEARING

After Judgment by District Court of Appeal
1st District, Division 2, Civ. No. 20483

In the Supreme Court of the State of California

In Bank

Heavy, Highway Building & Construction Teamsters Committee for Northern California, et al.,
Petitioners,
vs.
Superior Court of the City and County of San Francisco,
Respondent,
California Dump Truck Owners Association, et al.,
Real Parties in Interest.

Petition of Real Parties in Interest for hearing DENIED.

Traynor, J. is of the opinion that the petition should be granted.

Gibson, Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 11 day of July A.D. 1962.

William I. Sullivan, Clerk,
By R J B, Deputy Clerk.

Filed Jul 11 1962
William I. Sullivan, Clerk
By.....
Deputy.

Appendix C

MODIFYING AGREEMENT.
(As set forth in Petition for Writ of Review, Exhibit B.)

AGREEMENT MODIFYING
Associated General Contractors
Teamsters Master Agreement
Re: Owner-Operator

The parties agree that the Teamsters Master Agreement, dated the 8th day of July, 1959, between Northern and Central California Chapter, The Associated General Contractors of America, Inc., as Collective Bargaining Representative of Employer, and the Heavy, Highway, Building and Construction Teamsters Committee for Northern California, as Union, is hereby modified and changed as follows:

1. Section 24 of said Master Agreement is revised to read:

"Section 24—Owner-Operator

(A) Whenever owner-operator is used in this Section, it means owner-driver only and nothing in this Section shall apply to any person or equipment except where the owner of the equipment drives the equipment in the performance of work covered by this Agreement for an individual employer.

(B) Legal or equitable title to the equipment must be in the name of the actual owner.

(C) The individual employer expressly reserves the right to control the manner, time,

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means and details of, and by which the owner-operator performs his services, as well as the ends to be accomplished and shall be the sole judge of the capability of the owner-operator's equipment to perform the work required to be performed and may if the individual employer determines that the owner-operator's equipment is not capable of performing the work required to be performed, terminate such owner-operator's services. Failure to work the day or one-half (½) day out as directed shall terminate the owner-operator's employment and he shall be paid only for actual time worked prior to such failure. The individual employer shall not pay for time spent by the owner-operator in repairing, servicing or maintaining his equipment after termination of employment or before or after his shift or half-shift, as the case may (1) be.

(D) The Owner-Operator shall be carried on the pay-roll of the individual employer as a driver and as such driver, all of the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him except as provided elsewhere in this Section and except that in the event that it is determined that the services of an owner-operator were terminated without just cause, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall

not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that owner-operators shall not be subject to the provisions of Sections 3 (A) through (E) 5. Provided that the Union shall be notified of the name and social security number of the owner-operator within forty-eight (48) hours after the owner-operator is hired.

(E) No provision of other Sections of this Agreement shall be interpreted as requiring payments for the use, maintenance or servicing of the owner-operator's equipment.

(F) Separate checks shall be issued by the individual employer for such driver's wages and vacation payment and equipment. The amount of the separate check for such driver's wages shall not reduce the amount actually received for equipment compensation as distinguished from wages to a level below that provided for in subsection (J) of this Section.

(G) Compensation for the equipment shall be by check for the full amount due, less any agreed advances. A statement of any charges by the individual employer shall be issued at the same time.

(H) The owner-operator shall provide and shall have sole responsibility for gasoline, oil, grease, tires, tubes, repairs, and any other items necessary to operate his equipment. He shall

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have complete freedom to purchase any such items at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

(I) There shall be no interest or handling charge on earned money advanced prior to the regular pay day.

(J) The provisions of this Section have been negotiated and agreed upon by and between the parties for the objects and purposes expressed in Subsection (M) of (2) this Section. The parties have not undertaken to negotiate for the employees any profit whatsoever for the leasing and rental of the equipment they drive. On the contrary, compensation for the equipment shall be set by agreement between the individual employer and the owner-operator at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Agreement.

(K) There shall be no reductions by reason of the signing of this Agreement where the present basis of payment is more favorable to the owner-operator than the basis provided for herein.

(L) It is further understood and agreed that any arrangements which have heretofore been entered into between employees (owner-operator) either among themselves or with an

individual employer or with the aid of an individual employer applicable to owner-driver equipment contrary to the terms hereof shall be dissolved or modified within thirty (30) days after this Section becomes effective in accordance with Subsection (P) of this Section, so that such arrangements shall conform to this Section. In the event that the parties to such an arrangement cannot agree upon a method of dissolution or modification of such arrangement to make the same conform to this Section, the question of dissolution or modification shall be submitted to the grievance procedure under Section 10 hereof.

(M) It is further mutually understood and agreed that the intent of this Section is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement.

(N) It is further agreed that the individual employer will not devise or put into operation any scheme, whether herein enumerated or not, to defeat the terms of this Section of this Master Agreement, nor shall any owner-operator's arrangement with an individual employer be terminated for the purpose of depriving any other employee of employment. In the event that the individual employer has available

equipment the owner-operator may be assigned to operate such equipment on the job during the period of the repair of the owner-operator's equipment and not to exceed forty-eight (48) hours and so long as no employee is laid off to (3) provide work for such equipment.

(O) No owner-operator shall have any right to enforce this Agreement by grievance, arbitration or otherwise with respect to such owner-operator's five (5) working days with an individual employer on a particular job nor may the Union enforce it on his behalf.

(P) The provisions of this Section shall be effective only on work bid on or after October 1, 1960.

(Q) This Section shall not apply to trucking jobs of five (5) working days or less duration."

2. The following Subsection is added to Section 3:
"(G) Owner-Operators:

Owner-operators shall not be subject to the provisions of Subsections 3(A) through (E) (5) of this Section 3, provided that the Union shall be notified of the name and social security number of the owner-operator within forty-eight (48) hours after the owner-operator is hired."

3. Except as modified and changed by paragraphs numbered 1 and 2 above, said Master Agree-

ment as amended and each Section thereof shall continue in full force and effect in accordance with their terms.

In Witness Whereof, the parties hereto have caused this Modification Agreement to be executed by their respective officers duly authorized to do so as of the 27th day of October, 1960.

FOR THE EMPLOYER:
Northern & Central California Chapter, The Associated General Contractors of America, Inc.
By: S/ Paul A. Elsner, President
By: S/ Bruce McKenzie, Secretary

FOR THE UNION:
Heavy, Highway, Building and Construction Teamsters Committee for Northern California
By: S/ J. F. Ward, Chairman
By: S/ Gerald A. Shearin, Secretary

Appendix D

FIRST AMENDED COMPLAINT.

(As set forth in Petition for Writ of Review, Exhibit D.)

William D. Campbell
453 South Spring St.
Los Angeles 13, California
MA 4 1311

Scott Elder
200 Bush Street
San Francisco 4, California
YUkon 1-1050
Attorney for Plaintiffs

In the Superior Court of the State of California
in and for the County of San Francisco

Civil No. 507 496

California Dump Truck Owners Association, a California corporation; Robert Brierley, Herbert Behlow, Howard T. Fry,
Plaintiffs,

vs.

Northern & Central California Chapter, The Associated General Contractors of America, Inc., a California corporation; Heavy, Highway Building & Construction Teamsters Committee for Northern California, an unincorporated association; J. F. Ward, Chairman thereof; Doe Two, secretary-treasurer thereof;

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association; James R. Hoffa, president thereof; Doe Three, secretary-treasurer thereof; Western Conference of Teamsters, an unincorporated association; Einer Mohr, president thereof; Doe Five, secretary-treasurer thereof;

Teamsters Local Union No. 70, an unincorporated association; Doe Six, president thereof; John P. Sweeney, secretary-treasurer thereof; Teamsters Local Union No. 94, an unincorporated association; Victor Olson, president thereof; Doe Nine, secretary-treasurer thereof; Teamsters Local Union No. 137, an unincorporated association; Herbert Howell, president thereof; Doe Eleven, secretary-treasurer thereof; Teamsters Local Union No. 150, an unincorporated association, Thomas Keegan, president thereof; Doe Thirteen, secretary-treasurer thereof; Teamsters Local Union No. 216, an unincorporated association; James F. Ward, president thereof;
(1)

Doe Fifteen, secretary-treasurer thereof; Teamsters Local Union No. 287, an unincorporated association; Jo Powers, president thereof; Doe Seventeen, secretary-treasurer thereof; Teamsters Local Union No. 315, an unincorporated association; Thomas W. Thompson, president thereof; Doe Nineteen, secretary-treasurer thereof; Teamsters Local Union No. 386, an unincorporated association; John Rae, president thereof; Doe Twenty-one, secretary-treasurer thereof; Teamsters Local Union No. 431, an unincorporated association;

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Paul Smith, president thereof; Doe Twenty-three, secretary-treasurer thereof; Teamsters Local Union No. 439, an unincorporated association; George Cloud, president thereof; Doe Twenty-five, secretary-treasurer thereof; Teamsters Local Union No. 490, an unincorporated association; James H. English, president thereof; Doe Twenty-seven, secretary-treasurer thereof; Teamsters Local Union No. 624, an unincorporated association; Lowell A. Patterson, president thereof; Doe Twenty-nine, secretary-treasurer thereof; Teamsters Local Union No. 684, an unincorporated association; Rupert F. Parton, president thereof; Doe Thirty-one, secretary-treasurer thereof; Teamsters Local Union No. 890, an unincorporated association; Howard Allman, president thereof; Doe Thirty-three, secretary-treasurer thereof; Teamsters Local Union No. 912, an unincorporated association; Richard King, president thereof; Doe Thirty-five, secretary-treasurer thereof; Teamsters Local Union No. 980; James Campbell, president thereof; Doe Thirty-seven, secretary-treasurer thereof; Teamsters Local Union No. 533, an unincorporated association; Doe Thirty-eight, president thereof, Doe Thirty-nine, secretary-treasurer thereof;

Doe One Association to Doe Twenty Association (inclusive of all intervening numbers as though each said Doe Association were separately and severally designated) each an unincorporated association;

Doe Forty to Doe One Hundred (inclusive of all intervening numbers as though each said Doe were separately and severally designated), and as representative of a class to which they belong;

Roe One Company, a corporation through Roe One Hundred Company, a corporation (inclusive of all intervening numbers as though each said Roe Company were separately and severally designated).
(2)

FIRST AMENDED COMPLAINT FOR INJUNCTION AND FOR DAMAGES

The plaintiffs file this First Amended Complaint, and complain of defendants and each of them and for cause of action allege:

I.

That plaintiff, California Dump Truck Owners Association is and at all times hereinafter mentioned was a non-profit corporation duly organized and existing under and by virtue of the laws of the State of California and is duly qualified to do business in the State of California, and has its principal place of business in the County of Los Angeles, State of California; that plaintiff, Robert Brierley is a member of and president of the plaintiff association, and is an owner-driver, as hereinafter more fully described, and a resident of the County of Los Angeles, State of California; that plaintiff, Herbert Bahlow, is a member of plaintiff association, and is secretary of the South Bay Chapter of said plaintiff association, and is an owner-driver as hereinafter more fully described, and (3) is a resident of the County of Santa Clara, State of California; that plaintiff Howard T. Fry, is a

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member of plaintiff association, and is an owner-driver as hereinafter more fully described, and is a resident of the City and County of San Francisco, State of California.

II.

Plaintiffs are informed and believe and on that ground allege:

That the defendant, Northern and Central California Chapter, the Associated General Contractors of America, Inc., is a non-profit corporation duly organized and existing under and by virtue of the laws of the State of California, and at all times herein mentioned has had, and now has, its principal place of business in the City and County of San Francisco, State of California;

That the defendants, Doe One Association to Doe Ten Association (inclusive of all intervening numbers as though each said Doe Association were separately and severally designated) are (3) each an unincorporated, non-profit association organized and existing in the Northern California area, as hereinafter defined, and affiliated with the defendant, Northern and Central Chapter, The Associated General Contractors of America, Inc.

That the defendants, Roe One Company, a corporation, through Roe One-Hundred Company, a corporation (inclusive of all intervening numbers as though each said Roe Company were separately and severally designated) each are corporations organized and existing under and by virtue of the laws of the State of

California, and at all times herein mentioned have had and now have, their principal places of business in the City and County of San Francisco, State of California, or elsewhere in the Northern California area as hereinafter defined.

That all of the above said defendants listed in this paragraph II are, for the sake of convenience, hereinafter referred to collectively as Contracting Employers unless otherwise specifically noted. That all of said Contracting Employers at all said times in this complaint set forth have been, and now are, acting in concert each with the other and with the other said defendants herein named, with respect to the acts and matters herein mentioned, and with respect to the activities, agreements and combinations herein described.

That at all times herein mentioned the defendant, Northern and Central California Chapter, The Associated General Contractors of America, Inc., has acted and now acts as collective bargaining representative of all of said defendant Contracting Employers;

The defendant, Heavy, Highway, Building and Construction Teamsters Committee for Northern California hereinafter called "Teamsters Union Committee" or "Teamsters Committee"; defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called "International Union"; Western Conference of Teamsters, hereinafter called "Western Conference", defendants, Teamsters Local Union No. 70; Teamsters Local Union No. 94; Teamsters Local Union No. 137; Team-

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sters Local Union No. 150; Teamsters Local Union No. 216; Teamsters Local Union No. 287; Teamsters Local Union No. 315; Teamsters Local Union No. 386; Teamsters Local Union No. 431; Teamsters Local Union No. 439; Teamsters Local Union No. 490; Teamsters Local Union No. 624; Teamsters Local Union No. 684; Teamsters Local Union No. 890; Teamsters Local Union No. 912; Teamsters Local Union No. 980; Teamsters Local Union No. 533; hereinafter called "Local Unions"; the defendants Doe Eleven Association to Doe Twenty Association (inclusive of all intervening numbers as though each said Doe Associations were separately and severally designated), and now and at all times herein mentioned were unincorporated associations and constituted of more than two persons and parties to the activities, agreements and combinations herein mentioned, and are labor organizations which represent employees in one or more industries affecting commerce, including the highway, general building and construction industry, and the asphalt, rock, sand, gravel and ready-mixed concrete industries of Northern California. The duly authorized and acting officers and agents of each of said defendant unions are and at all times mentioned herein have been engaged in representing and acting for employee members thereof within the said Northern California area;

That said defendants, Heavy, Highway, Building and Construction Teamsters of Northern California, and Teamsters Local Union No. 216, have their principal place of business in the City and County of San

Francisco, State of California, and the foregoing allegations are true as to all times herein mentioned.

That said defendants, Local Unions, said Doe Eleven Association through Doe Twenty Association, inclusive, are affiliated with and are members of the said defendant Teamsters Union Committee, and of the said defendant Western Conference, and of the said defendant (5) International Union. Each of the employees and individual members of said Local Unions and said defendants, Doe Eleven Association through Doe Twenty Association, inclusive, and said defendant Teamsters Union Committee, are also affiliated with and are members of the defendant International Union, and of defendant Western Conference Union.

That all the Union defendants herein (Teamsters Union Committee, International Union, Western Conference, Local Unions, and individual members and officers of said Unions) are hereinafter referred to collectively as "The Unions" or "The Defendant Unions."

The defendants, James R. Hoffa, J. F. Ward, Einer Mohr, John P. Sweeney, Victor Olson, Herbert Howell, Thomas Keegan, James F. Ward, Jo Powers, Thomas W. Thompson, John Rae, Paul Smith, Doe One, George Cloud, Doe Four James R. English, Doe Seven Lowell A. Patterson, Doe Eight, Rupert F. Parton, Doe Ten Howard Allman, Doe Eleven Richard King, Doe Twelve, and James Campbell, Doe Fourteen, and Doe One through Doe Seventy, inclusive, excepting therefrom: Doe Sixteen, Doe Eighteen,

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Doe Twenty, Doe Twenty-two, Doe Twenty-four, Doe Twenty-six, Doe Twenty-eight, Doe Thirty, Doe Thirty-one, Doe Thirty-four, Doe Thirty-six are and at all times herein mentioned have been officers, members, agents and representatives of the said defendant Unions, and parties to the activities, agreements and combinations herein mentioned, and all acts herein alleged to have been performed by them were performed within the course and scope of their employment as said officers, members, agents, and representatives.

III.

That each and every of the defendants named herein is, and at all times in this complaint set forth has been, acting to [in] concert with the other defendants with respect to the acts and matters herein mentioned and with (6) respect to the unlawful activities, agreements and combinations herein described.

IV.

The true names of said defendants Doe One through One-Hundred, inclusive, excepting therefrom: Doe One, Doe Four, Doe Seven, Doe Eight, Doe Ten, Doe Eleven, Doe Twelve, Doe Fourteen, Doe Sixteen, Doe Eighteen, Doe Twenty, Doe Twenty-two, Doe Twenty-four, Doe Twenty-six, Doe Twenty-eight, Doe Thirty, Doe Thirty-two, Doe Thirty-four and Doe One Association through Doe Twenty Association, inclusive, and Roe One Company, a corporation, through Roe One-Hundred Company, a corporation, are unknown to plaintiff, and for that reason they are sued herein

under said fictitious names, and plaintiff prays that when the true names and identities as to relationship and positions of said defendants ars ascertained, they may be inserted herein by amendment of this complaint and that this action may then proceed against them under their true names and positions.

V.

This action is directed against all defendants named herein whether as an individual corporation, association or company, and as members and as representatives of the various defendants and defendant Unions named herein; All of the members of said Unions have not been named herein for the reason that they are too numerous and it is impracticable to bring them all before the court, but said cause of action is of common and general interest to each of said Unions and to each and all members thereof, and that said individuals named herein [are] representative of a class to which all other members belong. (7)

VI.

Plaintiff California Dump Truck Owners Association, hereinafter called "plaintiff association", is a nonprofit corporation whose members, including plaintiffs Robert Brierl[e]y, Herbert Behlow, and Howard T. Fry, comprise approximately seven hundred (700) independent dump truck owners who are engaged in the transportation business by dump truck, including tractor and dump truck trailers, as "High-

way Permit Carriers" as that term is defined in Section 3515 of the Public Utilities Code of the State of California. Many members of plaintiff association have their places of residence and business in the City and County of San Francisco and elsewhere in the Northern California area and numerous other members of plaintiff association reside in Southern California and migrate seasonally to and carry on their dump truck business in the Northern California area. The said Highway Permit Carrier transportation business of each of the members of plaintiff association consists of the transportation of property for hire and compensation as a business over public highways in this State by means of motor vehicle, to-wit, dump truck. Said business is and is required by the Public Utilities Code of this State to be operated under the jurisdiction of and regulation by the Public Utilities Commission of the State of California. Pursuant to and by virtue of said regulation, each of the members of plaintiff association, among other things, is required to and does hold a permit as a Highway Permit Carrier issued by said Public Utilities Commission, performs his transportation services subject to rules and regulations prescribed by said Public Utilities Commission, and collects and receives compensation for his transportation service at rates and charges not less than the minimum rates and charges established and prescribed by said Public Utilities Commission. Said minimum rates and charges are required by law to be just and reasonable, and in establishing and prescribing such just

and reasonable minimum rates and (8) charges, said Public Utilities Commission was and is required by law to give and has given and does give consideration, among other things, to the cost of all transportation services performed, including length of haul, value of the commodity transported, and the value of the facility reasonably necessary to provide the transportation service. Said minimum rates and charges, however, were established on the basis of average transportation conditions encountered by highway permit carriers by dump truck in California, and said Public Utilities Commission has not established any maximum or exact rates or charges other than said minimum for dump truck transportation service and there is no regulation against charging and collecting higher than minimum rates and charges; and highway permit carriers by dump truck do from time to time charge and collect such higher than minimum rates and charges.

The members of plaintiff association are in competition with each other and with nonmember Highway Permit Carriers by dump truck for the patronage and transportation business of persons needing and using transportation service by dump truck, including the patronage and transportation business of the defendant contracting employers. In the conduct of his said Highway Permit Carrier transportation business, each of the members of plaintiff association owns and operates in his said business at least one dump truck, and many of said members operate fleets of two or more dump trucks.

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While transporting property for hire or compensation in the conduct of his said business, each of the members who owns but one dump truck usually drives and operates such dump truck himself, and each of the members who owns a fleet of two or more dump trucks usually or from time to time drives and operates one of said dump trucks himself and operates his other dump truck or dump trucks by and through the services of drivers whom he employs for that purpose, with whom in the course (9) of such employment he stands in the relationship of master and servant, who are members of one or another of defendant local unions, and who work for him at wages and subject to conditions of employment prevailing from time to time pursuant to Teamster-Union negotiated labor contracts in the areas affected.

The said members of plaintiff association, including plaintiffs Robert Brierl[e]y, Herbert Behlow, and Howard T. Fry, while driving and operating their own dump trucks in the course of their respective business, are hereinafter in this complaint and in the so-called "Owner-Operator Agreement" hereinafter referred to in Paragraph IX hereof, called "owner-operators" or "owner-drivers". All of said owner-operator members of Plaintiff Association have not been named herein as plaintiffs for the reason that they are too numerous and it is impracticable to bring them all before the court, and plaintiffs prosecute this action primarily for and on behalf and for the benefit and as representatives of said other member

owner-operators as a class to which all of them belong. Plaintiffs are informed and believe and on such information and belief allege that there are approximately 2,500 other independent self-employed dump truck owners who are not members of Plaintiff Association but who are engaged in the transportation business by dump truck as Highway Permit Carriers and in the conduct of their said business drive and operate their dump trucks as "owner-operators" and who would be and are affected by the things and matters herein alleged in the same manner as the members of Plaintiff Association.

VII.

Each of the members of Plaintiff Association, including each of plaintiffs, Robert Brierley, Herbert Behlow and Howard T. Fry, in the conduct of his said Highway Permit Carrier transportation business ordinarily (10) performs transportation service, subject to the aforesaid regulation by said Public Utilities Commission, for one or another or several of the defendant contracting employers members of defendant Northern and Central California Chapter, The Associated General Contractors of America, Inc., including those hereinafter referred to in paragraph IX and the succeeding paragraphs in this complaint, which are listed as employer organizations in the Master Labor Agreement therein mentioned. Said transportation service includes, among other things, the transportation of products, materials and commodities owned, produced or purchased by such defendant contracting employers for use in their own

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businesses or in the performance of their own services in heavy, highway building and construction work in the Northern California area, and each such member of plaintiff association in performing his transportation service for such a contracting employer, whether by dump truck driven and operated by the said member himself as an owner-operator or by dump truck driven and operated by a driver employed by the said member as aforesaid, at all times pays all costs for maintenance, has and exercises exclusive possession of and control and dominion over such dump truck and its use and operation, including the size and numbers of loads hauled per day, and the property transported thereon is at all times in the course of such transportation in his exclusive custody and possession, and the said member at all times has and exercises complete control and direction over the manner and means to be used in operating such dump truck or dump trucks and performing the transportation service; and said member is compensated for his said transportation service by the payment to him by such contracting employer of transportation charges computed at rates and charges not less than said minimum rates and charges established by said Public Utilities Commission, and not by the payment of wages, and is a self-employed (11) independent contractor and not an employee of such contracting employer.

VIII.

That the plaintiffs, Robert Brierley, Herbert Behlow and Howard T. Fry, and members of Plaintiff

Association, at all times herein mentioned, were never at any time, directly or indirectly, either collectively or as individuals, represented by the defendant labor unions, or any of them, in any of the negotiations leading to the agreements hereinafter referred to in Paragraph IX and succeeding paragraphs of this complaint. Likewise never were the said plaintiffs, or members of Plaintiff Association, directly or indirectly, either collectively or as individuals, represented in said negotiations by said defendant Contracting Employers or by said defendant, Northern and Central California Chapter, The Associated General Contractors of America, Inc., or by any one else.

That the said plaintiffs and members of Plaintiff Association were not present or represented at all and had no voice and were permitted no participation of any kind in said negotiations, and are not in any respect or sense whatever, directly or indirectly, parties to the said agreements or any of them.

That the plaintiff Association did not participate in any of said negotiations or agreements or have any connection therewith, directly or indirectly.

IX.

That for several years the defendant Contracting Employers, and the defendant Unions have entered into agreements from year to year, or for longer (12) (13) periods of time, in what is termed and known as the Master Labor Agreement by and between Northern and Central California Chapter, The Asso-

ciated General Contractors of America Inc., as collective bargaining representative of said contracting employers and the Heavy, Highway, Building and Construction Teamsters Committee for Northern California, referred to in the agreement as "the Union" and referred to herein as "Teamsters Union Committee" as collective bargaining representative of the teamster-employees in the Northern California area.

That the defendant the Northern and Central Chapter, The Associated General Contractors of America, Inc., hereinafter referred to as "Contracting Employer" is now and at all times herein mentioned has been the Collective Bargaining Representative of all of said contracting employer organizations who are affiliated with said Contracting Employer and Collective Bargaining Representative of all other contracting employers who are not members of or affiliated with said Contracting Employer organization who wish to become a party to the Master Labor Agreement, that the said Master Labor Agreement provides that any and all of such employer organizations may become parties to the said Master Labor Agreement by signing the Schedule "A" set forth therein which reads as follows:

"SCHEDULE A

The undersigned employer hereby adopts and agrees to be bound by all the terms and conditions of the foregoing Master Construction Agreement.

Employer .....

By ....."

That all the said defendant contracting employer organizations are engaged generally in Heavy, Highway, Building and Construction work in the Northern California area as defined herein;

That at all times herein mentioned the said defendant Teamsters Union Committee has acted, and now acts, as Collective Bargaining Representative of all of said (14) defendant Unions and of all Teamster Union members-employees thereof in the said Northern California area; that all of said defendant Local Unions in said Northern California area, and said defendant Contracting Employers in said Northern California area, have signed the said Master Labor Agreements, including the last of said agreements dated July 8, 1959 and all amendments and supplements thereto as herein otherwise is more particularly set forth and have thereby adopted and agreed to be bound by, and are bound by, and are parties to, all of the terms and conditions thereof.

That the last of said Agreements is dated July 8, 1959 and provides it is to remain in effect until the 30th day of April, 1962 and shall be renewed from year to year thereafter unless either of the Collective Bargaining Representatives shall give written notice to the other of a desire to change it at least sixty days prior to the date of the expiration of the Agreement. That said Agreement covers what is generally known and referred to therein as the Northern California area which term is intended to mean that portion of California above the northern boundary of Kern County, the northern boundary of San Luis Obispo

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County, and the westerly boundaries of Inyo and Mono Counties.

That said Master Agreement deals, among other things, with wages, uniform rates of pay, hours of employment, and working conditions, area and locality preferences, shifts, hiring procedure, grievance procedure, work classifications, vacations, etc., pertaining to the teamster employees, workmen, employed by the said Contracting Employers, or other employers.

That among other provisions in the said agreement is the following:

"Section 24—OWNER OPERATOR

When a truck or piece of equipment is driven or operated by its owner and is used on work covered (15) by this Agreement, the owner-driver or operator of said truck, or piece of equipment, shall be subject to the applicable terms and conditions of this Agreement *but shall not in any event be subject to the hiring provisions hereof.* The Union and the Collective Bargaining Representative of the Employer shall appoint a joint committee on which each shall be equally represented, to work out revision of this Section on the subject of owner-operator. The Committee shall promptly enter into negotiations and in the event that no revision is worked out prior to May 1, 1960, the Union shall be free to engage in a strike, slow-down, or stoppage of work and use any other lawful economic force including picketing in support of its demands on the subject of the owner-operator, and Section 10 of this Agreement shall be inoperative as to this Section

and the entire question of the owner-operator." (Emphasis added.)

Section 10, referred to in the Agreement as becoming inoperative covers the grievance procedure.

That pursuant to said Master Agreement, dated July 8, 1959 and said Section 24 thereof, the parties to that agreement, under date of October 27, 1960 entered into an agreement modifying and changing Section 24 of said Master Agreement, a copy of which said modifying agreement is attached hereto, Marked Exhibit "A" and by reference made a part hereof as though set forth herein in full.

That all of the above named parties to said Modifying Agreement or supplemental agreement, Exhibit "A", are defendants herein.

That said Modifying Agreement or supplemental agreement Exhibit "A", is known generally and referred to, and is hereinafter referred to as the "Owner-Operator Agreement" or "Modifying Agreement".

That said Owner-Operator Agreement provides, (16) among other things:

(a) That it applies only to owner-operators or owner-drivers with legal or equitable title to the truck equipment being in the name of the actual owner "* * * where the owner of the particular equipment drives the equipment in the performance of work covered by this Agreement for an individual employer."

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(b) That "the individual employer expressly reserves the right to determine the manner, time, means and details of, and by which the owner-operator performs his service, * * *" and "* * * shall be the sole judge of the capability of the owner-operators equipment, * * *" and if the individual employer determines the equipment is not suitable may terminate the owner-operator's services; and that "the individual employer shall not pay for time spent by the owner-operator in repairing, servicing or maintaining his equipment after termination of employment, or before or after his shift or one-half shift, as the case may be."

(c) That the owner-operator must be carried on the individual employer's pay-roll as a driver and all of the terms and conditions of the Master Agreement, and any amendments thereto shall apply to him except that in the event it is determined that the services of an Owner-Operator were terminated without just cause, payment for time lost shall be limited to the wage and fringe benefit payments provided in the Master Agreement and shall not in any event include any payment with respect to the equipment or the loss of use thereof, and except further, that owner-operators shall not be subject to the provisions of Section 3(a) through (E)5—(which sections deal with employment and discharge,) and provides that the Union shall be notified of the name and Social Security Number of the owner-operator within 48 hours after the owner-operator is "hired" by the individual employer;

(d) That separate checks shall be issued by the individual employer for such Owner-Operators' wages and vacation payment and equipment; that the separate (17) check for wages shall not reduce the amount actually received for equipment compensation as distinguished from wages, and that the parties have not (by the modifying agreement) undertaken to negotiate for the "employees" (owner-operators) any profit whatsoever for the leasing and rental of the equipment they drive, but have provided that, on the contrary, compensation for the equipment shall be set by agreement between the individual employer and the owner-driver at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Agreement.

(e) That the Owner-Operator shall provide, and shall have sole responsibility for, gasoline, oil, grease, tires, tubes, repairs, and any other items necessary to operate his equipment.

(f) That any arrangements heretofore entered into between "employees" (Owner-Operators) among themselves or with an individual employer or with the aid of an individual employer, applicable to Owner-Driver equipment, contrary to the terms of said Master Agreement and said Modifying Agreement SHALL BE DISSOLVED OR MODIFIED WITHIN THIRTY DAYS AFTER THE MODIFYING AGREEMENT BECOMES EFFECTIVE, so that such arrangement shall conform to the said

Modifying Agreement. That while said Modifying Agreement was entered into October 27, 1960 it provided that the effective date would be October 1, 1960. This, in effect, required that any such prior agreements contrary to the terms provided in the said Modifying Agreement must be dissolved within four days—not thirty days—of the date of the said Modifying Agreement. If a method of dissolution or modification cannot be agreed upon, it shall be submitted to the grievance procedure under Section 10 of the Master Agreement.

(g) That the said Modifying Agreement does not apply to trucking jobs of five working days or less duration, although it requires the individual employer to notify the Union of the name and Social Security Number of the Owner-Driver within forty-eight hours (18) after the Owner-Driver is "hired."

That pursuant to Section 10 of the said Master Agreement dated July 8, 1959 a Board of Adjustment representing the Contracting Employers and the Union met on November 3, 1960 and considered the following dispute and rendered the following decision, under the provisions of sub-section (j) of Section 24 of the said Modifying Agreement.

"Issue in Dispute:

When the provisions of Section 24 of the Master Agreement apply to a situation where the equipment involved is a tractor only, at what minimum level must the rate for the rental of the tractor be set in order to comply with the provisions of subsection j of Section 24?"

Decision:

The Board of Adjustment finds and decides as follows:

1. Where the equipment involved is a tractor only, an agreement between an individual employer and an owner-operator which fixes the rate for the rental of the tractor at not less than $4.50 per hour for a tractor pulling a semi-trailer, and at not less than $5.50 per hour for a tractor pulling a set of double-trailers, will not circumvent or defeat the payment of wages, fringes, and conditions of any employee covered by the Master Agreement.

2. This decision shall apply to tractor only and shall not apply to other types of equipment.

3. The provisions of this decision shall be and remain in effect, without change, during the remaining term of the Master Agreement.

XI.

That the defendant Contracting Employers control and perform most of the heavy, highway, building and construction work in the Northern California area, and most of the Highway Permit Carrier business of the owner-operator members of Plaintiff Association, including plaintiffs Robert Brierley, Herbert Behlow, and Howard T. Fry, is done with and most of their Highway Permit Carrier operations are performed on the jobs of one or more of defendant Contracting Employers. As a general (19) rule and for a majority of their working time, said owner-operator members of said Plaintiff Association serve defendant Con-

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tracting Employers in their heavy, highway, building and construction businesses on trucking jobs of more than five days' duration and on many and various trucking jobs throughout the year, and said Section 24, as modified by said Modifying Agreement, applies to and affects said owner-operators by requiring the Contracting Employers to force them out of their said Highway Permit Carrier businesses and into employment as employees and servants of said defendant Contracting Employers, or into some entirely different field of economic activity, for a majority of the said owner-operators' working time. Without the patronage of defendant Contracting Employers and the opportunity to operate on their jobs of both more and less than five days' duration, said owner-operator members of Plaintiff Association will be unable to remain in business as Highway Permit Carriers by dump truck. Moreover, as Highway Permit Carriers, the owner-operator members of Plaintiff Association and other owner-operators are required to and do incur substantial costs incident to maintaining a license and operating their highway permit carrier businesses, including insurance, taxes, expenses incident to obtaining regular work, capital investment and necessary overhead; that under said Modifying Agreement, Exhibit A, and said Master Agreement, said owner-operators have and will have substantially added burdens incident to becoming employees of the defendant Contracting Employers during most of the working time each year, including the payroll deductions common to such an employee, some of which are

duplicated expenses, with the result that said owner-operator members of plaintiff association would be economically unable to continue in business as Highway Permit Carriers, to their irreparable damage.

XII

That in and by said Section 24 of the Master Agreement as modified by said Modifying Agreement, and said decision of the Board of Adjustment, defendants have unlawfully conspired and combined with the intention and for the purpose primarily of restricting and diminishing the business of transporting property by dump truck as a Highway Permit Carrier by restraining and preventing the owner-operator members of Plaintiff Association, including plaintiffs Robert Brierley, Herbert Behlow and Howard T. Fry, and nonmember owner-operator Highway Permit Carriers by dump truck as well, from continuing and engaging in and conducting their highway permit carrier business for any defendant Contracting Employer on any trucking job of more than five days' duration and forcing said owner-operators to abandon, discontinue and withdraw from their said highway permit carrier businesses and to become servants and employees of such defendant Contracting Employers in their heavy, highway, building and construction businesses, and, by putting said owner-operators out of business as aforesaid, preventing competition by said owner-operator Highway Permit Carriers with the other Highway Permit Carriers by dump truck in the transportation of property, products and commodities for the defendant Contracting Employers.

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XIII.

That pursuant to said unlawful combination defendants have unlawfully restricted, and continue to restrict, trade and commerce in the business of transporting property by dump truck as a Highway Permit Carrier and have unlawfully prevented, and are continuing to prevent, competition in the transportation of property, products and commodities, in that defendant Contracting Employers, acting in concert with the other defendants herein and in accordance with the terms and provisions of said Modifying Agreement and said decision of the (21) Board of Adjustment, have refused and continue to refuse to engage the services of the owner-operator members of Plaintiff Association, including plaintiffs Robert Brierley, Herbert Behlow, and Howard T. Fry, or of any non-member owner-operators as Highway Permit Carriers by dump truck on jobs of more than five days' duration and have refused to employ them at all on such jobs except as driver-employees carried on the payrolls of the individual defendant Employing Contractors and subject to their control and direction as to all details of the performance of the work, and have thereby forced and compelled, and continue to force and compel, said owner-operators to abandon and dis continue their highway permit carrier businesses and to withdraw and retire from competition with the other Highway Permit Carriers by dump truck in the transportation of property, products and commodities for the defendant Contracting Employers, all to their irreparable injury.

XIV.

Defendants and each of them did and continue to do the acts and things herein alleged, deliberately, wilfully and with full knowledge of the illegality of such acts, for the purpose of injuring plaintiffs and said owner-operator members of Plaintiff Association, in the conduct of its and their individual businesses and causing them thereby to suffer the damage herein alleged.

XV.

Defendants and each of them have done and are now doing, and threaten to and will continue to do, the acts herein alleged unless restrained and enjoined by this Court, and unless the relief herein prayed for is (22) granted a multiplicity of suits and actions will result.

XVI.

That said plaintiffs, members of Plaintiff Association and all other nonmember owner-operators as herein otherwise referred to, have no plain, speedy or adequate remedy at law; that it will be extremely difficult to measure the amount of monetary damages which would compensate for the said wrongful acts of defendants; that substantial and irreparable injury will (be) unavoidable for the reasons herein stated, and also because pecuniary compensation will not afford adequate and complete relief and because, as plaintiffs are informed and believe, and upon such

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information and belief allege that many of the defendants herein are incapable of responding in damages sufficient to compensate plaintiffs, and members of Plaintiff Association, owner-operators, for the injury sustained and to be sustained unless the relief prayed for is granted;

That unless the acts of defendants are permanently enjoined and restrained the businesses of said individual plaintiffs, and members of Plaintiff Association and said other owner-operators, will be destroyed or substantially ruined, and said plaintiffs, and said members of Plaintiff Association, and said other owner-operators, will be unable freely to compete in the field of their activity and enjoy the free pursuit of their business as contemplated by the laws of this State and as they have heretofore enjoyed the same. That it is extremely difficult and plaintiffs are unable to determine precisely the monetary damages or losses to Plaintiff Association and to said plaintiff Owner-Operators and said owner-operator members, and each of them, which has been caused by reason of the unlawful acts of the defendants herein complained of, or which may be caused if such acts are continued, and Plaintiff Association and its said owner-operator members have suffered damages and that such damages amount to and will continue (23) to amount to not less than approximately $1,000,000.00 upwards, per year, and that such damages can be prevented only by enjoining the unlawful acts herein complained of; that when such damages as have accrued and such additional damages as may hereafter be suffered have

been ascertained, plaintiffs will ask leave of Court to amend this complaint to set forth the amount (24) thereof.

For a Second Cause of Action Plaintiffs Complaint of Defendants and Each of Them and for Cause of Action Allege:

I.

Plaintiffs adopt and re-allege paragraphs I to XVI inclusive of the First Cause of Action as though set forth in full herein.

II.

That defendants and each of them have violated, and continue to violate, the provisions of the Cartwright Act of the State of California (Section 16,600, Sections 16,700-16,758, Business and Professions Code), that the terms of said Modifying Agreement and the actions of the defendants pursuant thereto are unlawful and against the public policy of the State of California, and void.

That the cost of operation of the plaintiffs' said businesses as independent contractors and highway permit carriers is based on a calculated number of hours of truck hauling per year, and that the Public Utilities Commission rates are predicated on past experience, including the average number of days of truck hauling per year; that plaintiffs are not and would not be able, working under the terms of said Modifying Agreement, Exhibit A, herein, to maintain the usual and expected minimum numbers of days of truck hauling per year as a result thereof cannot

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and will not be able to survive and their businesses will be ruined.

That it is and would continue to be economically impossible for the plaintiffs to pay all of the expenses required as a highway permit carrier and at the same time for the majority of their work have deducted from their "wages" the extra costs entailed when thus "employed." That if plaintiffs should thus be compelled to limit their work with defendants to jobs of five days or less, they could not survive economically, with the result in either event that they would be driven (25) out of their business and out of their opportunity as an independent businessman of earning a living with a chance to grow and prosper. That if plaintiffs, in view of the inevitable loss of work and added expenses, sought higher rates from the Public Utilities Commission it would result in higher costs to the public for highway construction and other state improvements, and therefore is against the public policy of the State of California.

Wherefore Plaintiffs pray judgment against the defendants, and each of them, for:

1. A final decree permanently enjoining and restricting the defendants, and each of them, and their officers, agents, members, servants, employees, representatives, organizers, and attorneys, and all persons in active concert and participation with them, or any of them, from the performance and commission of said acts and each of said acts hereinbefore complained of, and

(a) from engaging individually or in any combination or concerted activity to cause, re-

quire or compel said owner-operators, members of Plaintiff Association

(1) to enter into any agreements, understandings or association with the defendants, Contracting Employers, or other shippers or employers as employees under and pursuant to any of the terms and conditions of said Modifying Agreement, Exhibit A, in the complaint herein or said Master Labor Agreement, or otherwise or at all, or to execute any agreement with the said defendants, Contracting Employers, providing for any deductions or contributions from said Owner-Operators as State Permitted Carriers, not authorized by the Public Utilities Commission of the State of California, as a condition precedent to (26) said owner-operators, members of Plaintiff Association, obtaining contracts for hauling with and for any of said defendants, Contracting Employers, or any member thereof, or other shippers or otherwise, or at all.

(2) to be bound in any way or compelled to take any action under and pursuant to the Modifying Agreement, Exhibit A in the complaint herein.

(b) from in any way carrying out or effectuating the unlawful combination or concerted activity enjoined in sub-division (a) hereof;

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(c) from hindering, preventing or obstructing by any means whatsoever the receipt, shipment or delivery of property by said owner-operators, members of Plaintiff Association, to or from any Contracting Employer, shipper, receiver, or patron of plaintiffs as said owner-operators, members of Plaintiff Association, or to or from any other place.

2. A final decree declaring that each and all of any said agreements between the owner-operators, members of Plaintiff Association herein that may have been entered into between said owner-operators and said defendants, Contracting Employers, under and pursuant to said Modifying Agreement, Exhibit A herein heretofore executed by any of said owner-operators, members of Plaintiff Association, be declared null and void and without further force and effect, retroactive to their respective dates of execution, and that any and all payments made by or for or deducted from any moneys due said owner-operators, members of Plaintiff Association, in connection therewith be forthwith returned by those holding the same to the respective said owner-operators, or to those who may have made such payments.

3. A final decree declaring that each and all of plaintiffs, owner-operators, members of Plaintiff (27) Association, who are duly licensed by and operate under permits from and the regulations of the Public Utilities Commission of the State of California, as alleged in the complaint herein, are each "Highway

Permit Carriers" as that term is defined in Section 3515 in the Public Utilities Code of the State of California, and are owner-operators of their own trucking equipment and are independent contractors and self-employed persons engaged in the transportation of property in California for compensation or hire as a business under the jurisdiction of the Public Utilities Commission of the State of California, and are not employees, and that the defendants, and each of them, their officers, agents, members, servants and employees, representatives, organizers and attorneys, and all persons in active concert and participation with them, or any of them, or at their direction, be permanently enjoined and restrained from doing or attempting to do or cause to be done, directly or indirectly by any means, method or design whatsoever, to compel said owner-operators, members of Plaintiff Association, to submit or agree to or operate under the terms or conditions of the said Modifying Agreement, Exhibit A, in the complaint herein.

4. That defendants, and each of them, their officers, agents, members, servants, employees, representatives, organizers, and attorneys, and all persons in active concert and participation with them or any of them, or at their direction, be permanently enjoined and restrained from doing or attempting to do or cause to be done, directly or indirectly, by any means, method or design whatsoever, any of the acts enjoined in paragraphs 1, 2 and 3 hereof;

5. That the court make a final decree declaring that said Modifying Agreement, Exhibit A in the

complaint herein, be declared null and void ab initio and of no further force and effect.

6. That the Court make an order directing the defendants, and each of them, to show cause at a time and place specified in such Order why they and each of (28) them should not be enjoined and restrained during the pendency of this action from doing any of the acts or things set forth in paragraphs 1, 2, 3, 4, hereof;

7. That upon a hearing on said Order to Show Cause, a preliminary injunction be granted, in similar form, restraining defendants and each of them from doing any of the acts set forth in paragraphs 1, 2, 3, 4 hereof;

8. For such sum in damages for Plaintiff Association as the Court may determine to be proper in amount;

9. For such sum in damages for the individual plaintiffs and members of Plaintiff Association equal to two-fold the amount of the damages the court may determine to be proper in amount as sustained by each of said plaintiffs;

10. For costs of suit herein;

11. For such other and further relief as may be proper and appropriate under the circumstances.

William D. Campbell
and
Scott Elder

By.....

(29) Attorneys for Plaintiff

VERIFICATION

I, the undersigned, say:

I am the President of the plaintiff California Dump Truck Owners Association, a corporation, and also a plaintiff in the above-entitled action; I have read the foregoing First Amended Complaint for Injunction and for Damages and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on June 2, 1961, at Monterey Park, California.

/s/ Robert Brierley
Robert Brierley

(30)

Appendix E

PETITION FOR WRIT OF PROHIBITION.
(Exhibits Omitted.)

In the Supreme Court of the State of California

No. SF 20,956

Heavy, Highway Building & Construction Teamsters Committee for Northern California, for and on behalf of its affiliated Teamster Local Unions, their officers and members; J. R. Ward, chairman thereof;

Western Conference of Teamsters, an unincorporated association; Einer Mohn, President thereof;

Petitioners,

vs.

The Superior Court of the State of California in and for the City and County of San Francisco,

Respondent,

California Dump Truck Owners Association, a California corporation; Robert Brierley, Herbert Behlow, Howard T. Fry,

Real Parties in Interest.

PETITION FOR WRIT OF PROHIBITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the State of California:

The undersigned Petitioners petition this Honorable Court for the issuance of a Writ of Prohibition directed to the Respondent, the Superior Court and as causes and grounds therefore allege as follows:

I.

Petitioner Heavy, Highway Building and Construction Teamster Committee for Northern California (hereinafter referred to as Teamster Committee) is a Labor Organization within the meaning of the National Labor Relations Act as amended and is the recognized federal statutory representative for the purpose of collective bargaining with employers, as such terms are used in said Act, including but not limited to the Associated General Contractors of America, Inc., of all Drivers, Helpers, Truck Repairmen, Truck Repairmen Helpers, Truck Dispatchers (leadmen), Bootmen, Automotive Oilers and Greasers, Warehousemen and Warehouse Clerks.

Petitioner J. R. Ward is chairman and the principal officer of the Teamster Committee.

Petitioner Western Conference of Teamsters is an unincorporated association organized and existing under the authority of the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and comprised of all local unions and joint councils affiliated with said International Brotherhood within a geographical area consisting of thirteen states in the western part of the United States, including Hawaii and Alaska.

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Petitioner Einer Mohn is President and the principal officer of the Western Conference of Teamsters.

II.

The Northern and Central California Chapter, The Associated General Contractors of America, Inc. (hereinafter referred to as A.G.C.), is an employer within the meaning of that term as used in the National Labor Relations Act, as amended.

III.

In the course and conduct of the business operations of Individual Employers, members of the A.G.C. covered by the collective bargaining agreement, Exhibit A, collectively annually purchase and receive and for many years last past have purchased and received directly from points and places outside the State of California material, equipment and supplies valued at in excess of $50,000.00.

That the A.G.C. has been and at all times material herein is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the National Labor Relations Act.

IV.

As a federal statutory collective bargaining representative, the Teamster Committee entered into a collective bargaining agreement with the A.G.C., in the exercise of the federally granted rights under the National Labor Relations Act as Amended, on or about July 8, 1959, a copy of which collective bargain-

ing agreement is attached hereto, made a part hereof as if set forth in full herein and marked Exhibit "A".

V.

As such federal statutory collective bargaining representative the Teamsters Committee entered into an agreement modifying Exhibit "A" with the A.G.C. on or about October 27, 1961, a copy of which is attached hereto and made a part hereof as if set out in full herein and marked Exhibit "B".

VI.

On or about November 3, 1961 pursuant to Section 10 of the collective bargaining agreement, Exhibit "A", the Board of Adjustment made and entered its Finding and Decision, a copy of which is attached hereto as if set forth in full herein and marked Exhibit "C".

VII.

Each and every, all and singular the acts and things done by the Teamsters Committee and A.G.C. hereinabove set out were and each of them was done in the exercise of the rights granted by Section 7 of the National Labor Relations Act as Amended, and protected and regulated by Sections 8(a)(5), 8(b)(3) and 8(d) of the National Labor Relations Act as Amended.

VIII.

On the 27th day of January, 1961, there was commenced in the Respondent Court an action entitled

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California Dump Truck Owners Association, et al, v. Northern and Central California Chapter, the Associated General Contractors of America, Inc., et al, No. 507,496, on the Court's docket. Included among the numerous parties defendant named in the aforesaid action are the Petitioners in this proceeding, and in addition, a large number of Teamster Local Unions and many of their officers, which Local Unions are affiliated with Petitioners Western Conference of Teamsters, a stranger to the collective bargaining agreement Exhibits "A", "B" and "C", and with Heavy, Highway Building & Construction Teamsters Committee for Northern California. Such Teamster locals and their officers are represented by the aforesaid Teamster Committee, Petitioner herein, and are not named separately as petitioners because of their number.

IX.

The First Amended Complaint in Case No. 507,496 filed in Respondent Court, a copy of which is attached hereto and made a part hereof as Exhibit "D", seeks an injunction against the enforcement of Section 24 of the contract, as contained in Exhibits "A" and "B" and as interpreted in Exhibit "C". The section in question sets forth the terms and conditions under which Individual Employer members of Petitioner A.G.C. and all Individual Employers who are subject to the collective bargaining agreement, Exhibits "A", "B" and "C", may use the services of persons who drive equipment covered by the collective bargaining agree-

ment, Exhibits "A", "B" and "C" in the performance of work covered by the Exhibits "A", "B" and "C", and is hereafter referred to as the "owner-operator" clause. The owner-operator clause in the contract between A.G.C. and Teamsters Committee is derived from and is substantially identical with the same provision which was before the United States Supreme Court in *Local 24, Teamsters v. Oliver,* 358 U.S. 282, and 362 U.S. 605. In that case the Supreme Court ruled that because the clause fell within the scope of the Federal Law relating to collective bargaining, a state court is without power "to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." In addition to injunctive relief, the First Amended Complaint requests that the owner-operator clause be declared null and void, and that damages be awarded in consequence of its enforcement. The original complaint correctly alleges that the business covered by the Collective Bargaining Agreement between A.G.C. and Teamsters Committee affect interstate commerce, and the First Amended Complaint similarly correctly alleges that the operations of the Employer and Labor Organization involved, including Petitioner labor organizations and The Employer and Individual Employers collectively covered by the Collective Bargaining Agreement herein involved, affect interstate commerce. The First Amended Complaint also correctly states that the collective bargaining agreement between A.G.C. and the Teamsters Committee, Exhibits "A", "B" and

"C", is a master contract covering a large number of Individual Employers performing "most of the heavy, highway, building and construction work in the Northern California area."

X.

Following the filing of the First Amended Complaint, Petitioners herein and various other of the defendants in No. 507,496 filed demurrers thereto on the ground, *inter alia,* that Respondent Court was without jurisdiction of the subject matter of the action, in that

(a) The regulation of the matters to which the First Amended Complaint pertained was vested by federal law within the exclusive jurisdiction of the National Labor Relations Board.

(b) The exercise of the federal right to bargain collectively with respect to owner-operators could not be defeated by state policy, statutory or otherwise. *(Local 24, Teamsters v. Oliver, supra.)*

(c) These matters being arguably within the rights granted by Section 7 of the National Labor Relations Act as Amended and protected by Section 8(b) and 8(a) of said Act, the state courts were without jurisdiction. (*Garmon v. San Diego Bldg. Trades,* 353 U.S. 951 and 359 U.S. 236.)

The demurrers are attached hereto and made a part hereof as Exhibits "E", "F", "G" and "H", respectively.

XI.

On or about October 20, 1961, the Respondent Court entered an order, without opinion, overruling the demurrers filed to the First Amended Complaint. In overruling the demurrers, as described above, the Respondent Court has determined that it has jurisdiction over the subject matter of Case No. 507,496, and will, unless restrained, proceed to try such case in the ordinary course of events. Contrary to the Respondent Court's ruling, however, and on the face of the First Amended Complaint, the Court is without jurisdiction to hear and determine the matters presented by the First Amended Complaint. Such matters are subject to and exclusively controlled and regulated by the National Labor Relations Act, as Amended, 29 U.S.C. 141, et seq. State courts have been divested by that statute of authority to adjudicate with respect to the subject matters so regulated or protected.

XII.

A trial and adjudication by Respondent Court of Case No. 507,496 will cause irreparable injury to Petitioners, and to the remaining defendants in that proceeding whose interests are represented herein, in the following particulars:

a. In addition to the jurisdictional question, the First Amended Complaint presents factual issues which would require a lengthy trial and a substantial amount of preparation, including the testimony

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of numerous witnesses, many whose testimony can only be compelled by deposition since the collective bargaining agreement, Exhibits "A", "B" and "C", covers the forty-six Northern California counties. Such expenditures of time, effort and money could not be recovered even though the Respondent Court's determination that it has jurisdiction to hold such a trial were subsequently to be reversed on trial or thereafter.

b. As alleged in the First Amended Complaint (Exh. "D", par. IX), the collective bargaining agreement containing the owner-operator clause, which is challenged in Case No. 507,496, will expire on April 30, 1962. In the present state of the trial docket of Respondent Court, it is not likely that the trial in Case No. 507,496 could be had and the decision entered until near or after the expiration of the contract. Accordingly, it cannot be expected that a final decision on the jurisdiction question could be definitively obtained during the remainder of the contract term, if Case No. 507,496 is to be tried on its merits and determined in the ordinary course. A necessary consequence of a trial therefore would be to leave a serious and unresolved doubt during negotiations between A.G.C. and the Teamsters Committee for a succeeding contract as to whether the present arrangement respecting the treatment of the owner-operator problem is lawful, and whether it can be continued in effect and enforced.

c. The present contractual arrangements, now challenged in Case No. 507,496, respecting the employment of owner-operators by the Individual Employer members of Petitioner A.G.C. are the consequence of lengthy negotiations between A.G.C. and Petitioner Teamsters Committee, and deal with a problem which is of utmost importance in the bargaining relationship. The continuing pendency in Case No. 507,496 in Respondent Court has had and will continue to have an unsettling effect upon industrial relations, and is a potential source of serious industrial unrest and strife in the heavy and highway construction industry throughout Northern California.

d. In consequence of the filing and pendency of Case No. 507,496, the uncertainty and doubt which has thereby arisen as to the legality of the owner-operator clause of the present collective bargaining agreement, and the accumulation of damages that could result from the continuing enforcement of the owner-operator clause in the event of a decision adverse to Petitioners, that provision has not been and is not now being enforced by the parties to the contract. The continued pendency of Case No. 507,496 thus deprives the parties of the lawful fruits of their negotiations.

XIII.

Petitioners and the thousands of employees they represent as a federal statutory bargaining representative, have no plain, adequate or speedy remedy

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by appeal or in any other manner which will vindicate their interests in this matter, or will insure to them the peaceful enjoyment of their collective bargaining agreement to which they and their employees are lawfully entitled. For the reasons stated in paragraph V, above, it is physically impossible to obtain a ruling on Respondent Court's jurisdiction by way of appeal before the expiration of the contractual provision which is challenged in Case No. 507,496. An appeal procedure in the circumstances of this case will thus necessarily subject Petitioners and their employees to the injury described in paragraph XII, above.

XIV.

As appears from the foregoing, the real parties in interest in this proceeding are the plaintiffs in Case No. 507,496, to wit, California Dump Truck Association, a California Corporation, Robert Brierley; Herbert Behlow; and Howard T. Fry. Their attorneys of record in Case No. 507,496 are William D. Campbell, 453 South Spring Street, Los Angeles, California, and Scott Elder, 200 Bush Street, San Francisco 4, California.

Wherefore, petitioners pray that this Honorable Court issue against respondent an alternative Writ of Prohibition, returnable at an early date, compelling respondent to refrain and desist from entertaining any further proceedings or taking any further action in Case No. 507,496, now pending before it, or to show

cause why it should not so refrain and desist, and for such other relief as the Court may deem proper.

Dated:

/s/ P. H. McCarthy, Jr.,
P. H. McCarthy, Jr.,

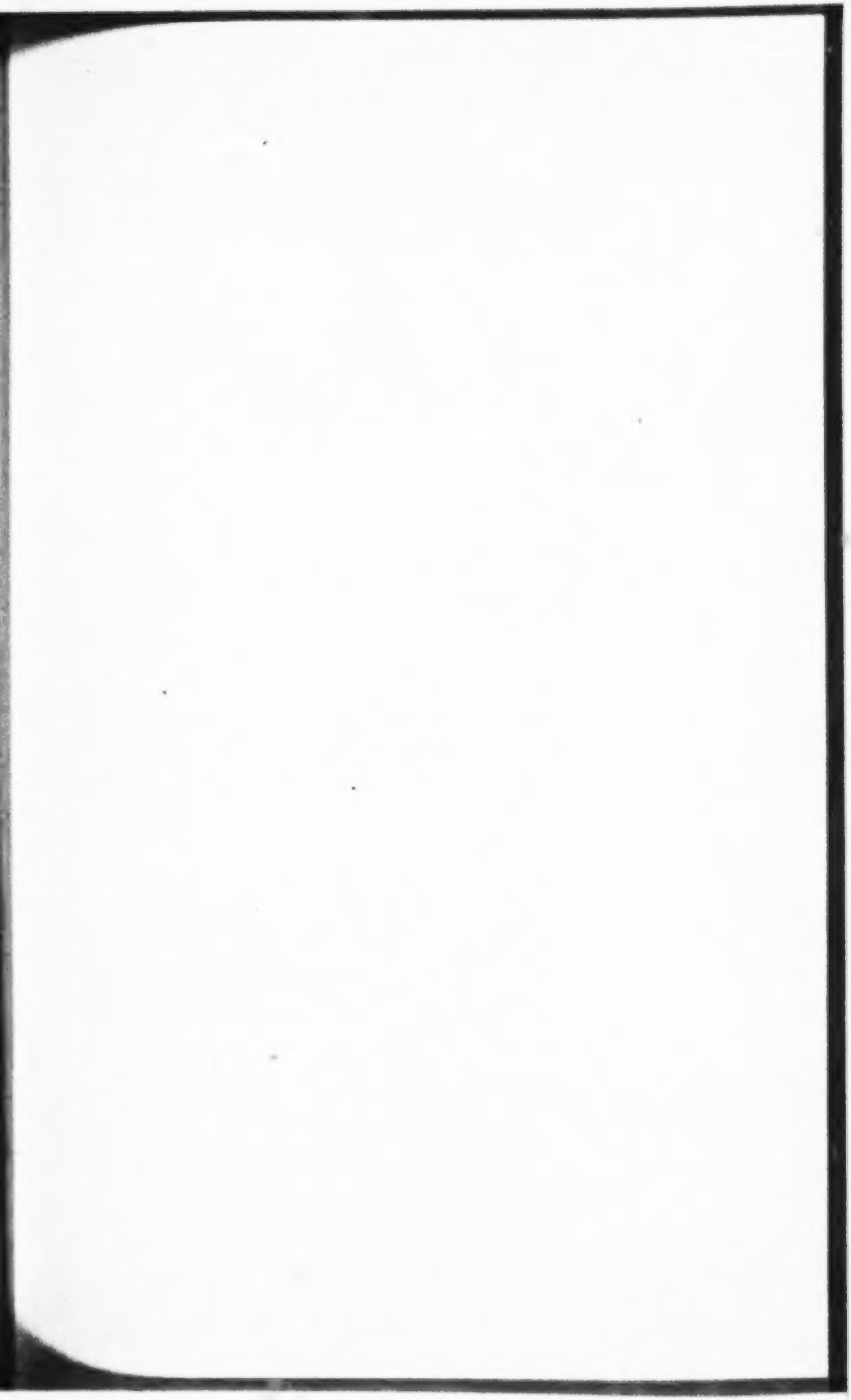
/s/ Robert LeProhn,
LeProhn & LeProhn,
By Robert LeProhn,

/s/ Duane B. Beeson
Neyhart & Groden,
By Duane B. Beeson,

Attorneys for Heavy, Highway Building & Construction Teamsters Committee for Northern California, for and on behalf of its affiliated Teamster Local Unions, and J. F. Ward, Chairman thereof.

/s/ Albert Brundage,
Albert Brundage,

Attorney for Western Conference of Teamsters, and Einer Mohn, president thereof.



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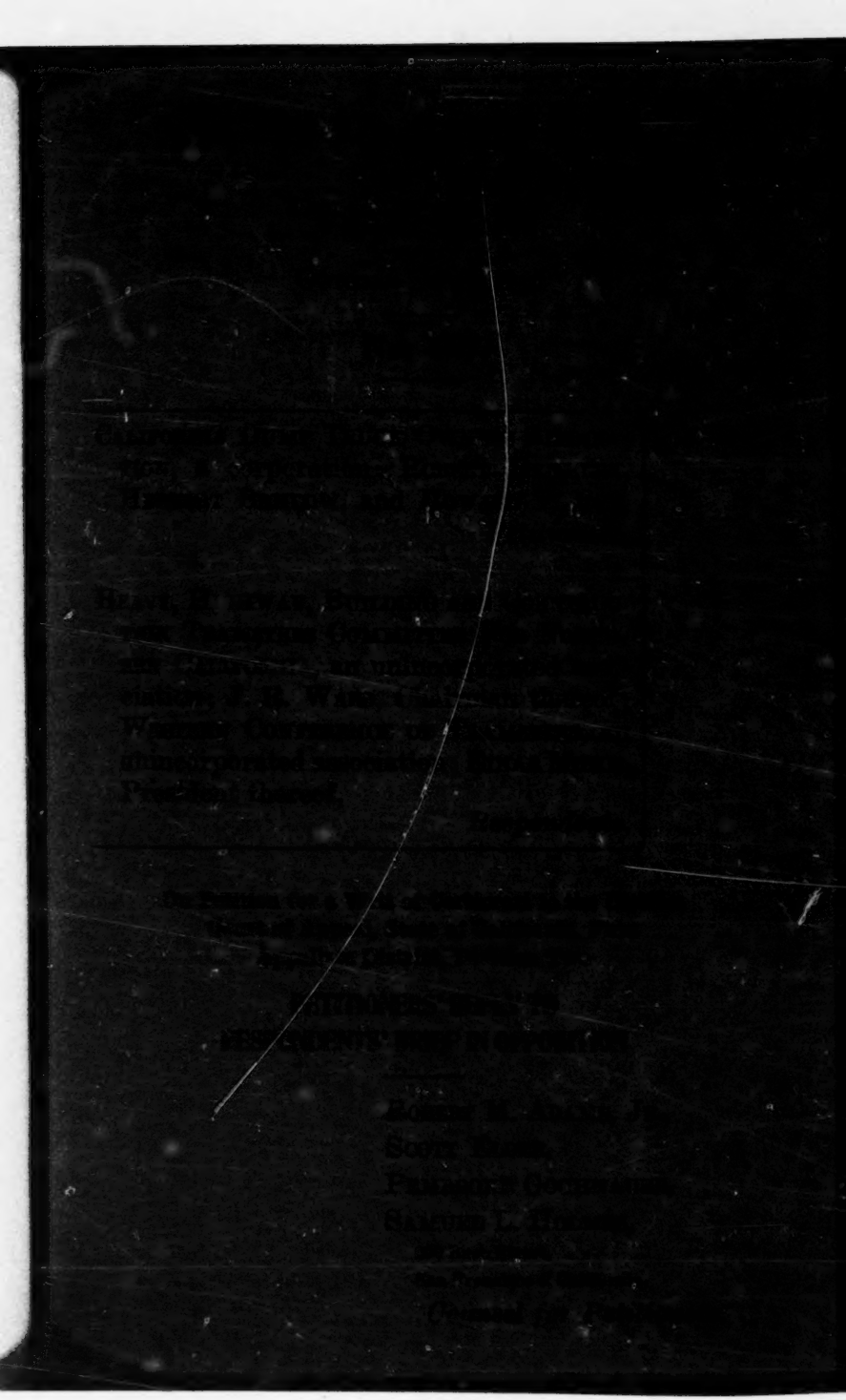

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Table of Authorities Cited

Cases	Pages
Gruenwald-Marx, Inc. v. Los Angeles Joint Board (1959), 52 Cal. 2d 568, 343 P. 2d 23	4
Jewel Tea Co., Inc. v. Local Unions, Etc., Amalgamated Meat Cutters & Butcher Workmen of North America (1960), 274 F. 2d 217	4
Local 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 362 U.S. 605	2, 3
San Diego Building Trades Council v. Garmon, 359 U.S. 236	2

Statutes	
National Labor Relations Act, as amended, 29 U.S.C. 157 and 158, 61 Stat. 140:	
Section 7	2
Section 8	2

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 457

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, a corporation; ROBERT BRIERLEY, HERBERT BEHLOW, and HOWARD T. FRY,
Petitioners,

vs.

HEAVY, HIGHWAY, BUILDING AND CONSTRUCTION TEAMSTERS COMMITTEE FOR NORTHERN CALIFORNIA, an unincorporated association; J. R. WARD, Chairman thereof; WESTERN CONFERENCE OF TEAMSTERS, an unincorporated association; EINAR MOHN, President thereof,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, State of California, First Appellate District, Division Two

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ARGUMENT

1. Respondents' Brief in Opposition does not discuss and hence does not dispute our contention that, there being no facts disclosing any arguable relationship between the subject matter of the Modifying Agreement and any authorized subject of collective bargaining, the Court below misinterpreted and misapplied the *Oliver* (358 U.S. 283, 362 U.S. 605) and *Garmon* (359 U.S. 236) decisions when in effect it denied state jurisdiction to adjudicate that issue. (Pet. for Writ of Cert., pp. 13-21.) Resting their opposition to certiorari primarily upon reiteration of the California court's declaration that the Modifying Agreement does concern wages, hours and other terms and conditions of employment, respondents make no answer at all to this other important ground of the petition.

2. Respondents' insistence that the subject of the Modifying Agreement is within the area of exclusive federal jurisdiction reflects the need for clarification as to when an activity must be deemed clearly enough within the protection of Section 7 or prohibition of Section 8 to require a state court to decline jurisdiction with respect to it.

Respondents apparently contend that collective bargaining to change the owner-operators' status from regulated self-employed independent contractors to employees, the admitted intent and effect of the clause (Brief, p. 3), must reasonably be deemed to come within the protection of the Act because use of owner-operators as independent contractors is, or rightly or

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wrongly is believed to be, a scheme or device to evade union wages and working conditions. But respondents do not answer our contention that there are no facts to support a conclusion that it is such a device or has any adverse effect on employed drivers. They advance nothing corresponding to the evidence in the *Oliver* case (358 U.S. at 291-292) as to the controversy regarding the use of equipment-leasing to break down the union wage scale. Respondents mention "problems created by the impact of the use of owner-operators on a contractor's employees" (Brief, p. 3) but no showing is referred to that any such problems or impact exist. They offer no explanation how, in view of the regulation to which the California owner-operators are subject as carriers, respondents can plausibly believe that the owner-operators' status as independent contractors is prejudicial to contractors' employees, nor do they point to anything of record declaring or implying that respondents do believe this.

Essentially, then, it is respondents' position that their mere averment that the provision is the product of protected and required collective bargaining deprives the state of jurisdiction. The Court below concurs, at least when the resulting provision is contained in a collective bargaining agreement and is phrased in terms modeled after one passed on by this Court. The California Supreme Court in an earlier case was of the view that use of the term "arguably" was not meant to imply that "a litigant can cause a state court to lose jurisdiction merely by the assertion that the particular activity is" protected or pro-

hibited, but must have meant "susceptible of reasonable argument." *(Gruenwald-Marx, Inc. v. Los Angeles Joint Board* (1959), 52 Cal. 2d 568, 584; 343 P. 2d 23, 32.) The Seventh Circuit Court of Appeals has held that a mere incidental effect on employees is not enough to place an activity within the National Labor Relations Board's exclusive primary jurisdiction. *(Jewel Tea Co., Inc. v. Local Unions, Etc., Amalgamated Meat Cutters & Butcher Workmen of North America,* (1960), 274 F.2d 217.)

Here, plainly, is a recurring problem of significant importance on which there is disagreement and uncertainty. Certiorari in this case would provide an opportunity for needed clarification.

It is respectfully prayed, therefore, that writ of certiorari be granted.

Dated, San Francisco, California,
October 31, 1962.

Respectfully submitted,
ROBERT M. ADAMS, JR.,
SCOTT ELDER,
PEMBROKE GOCHNAUER,
SAMUEL L. HOLMES,
Counsel for Petitioners.

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 457

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, A CORPORATION; ROBERT BRIERLEY, HERBERT BEHLOW, AND HOWARD T. FRY, *Petitioners,*

v.

HEAVY, HIGHWAY, BUILDING AND CONSTRUCTION TEAMSTERS COMMITTEE FOR NORTHERN CALIFORNIA, AN UNINCORPORATED ASSOCIATION; J. R. WARD, CHAIRMAN THEREOF; WESTERN CONFERENCE OF TEAMSTERS, AN UNINCORPORATED ASSOCIATION; EINAR MOHN, PRESIDENT THEREOF, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO.

BRIEF FOR RESPONDENTS IN OPPOSITION

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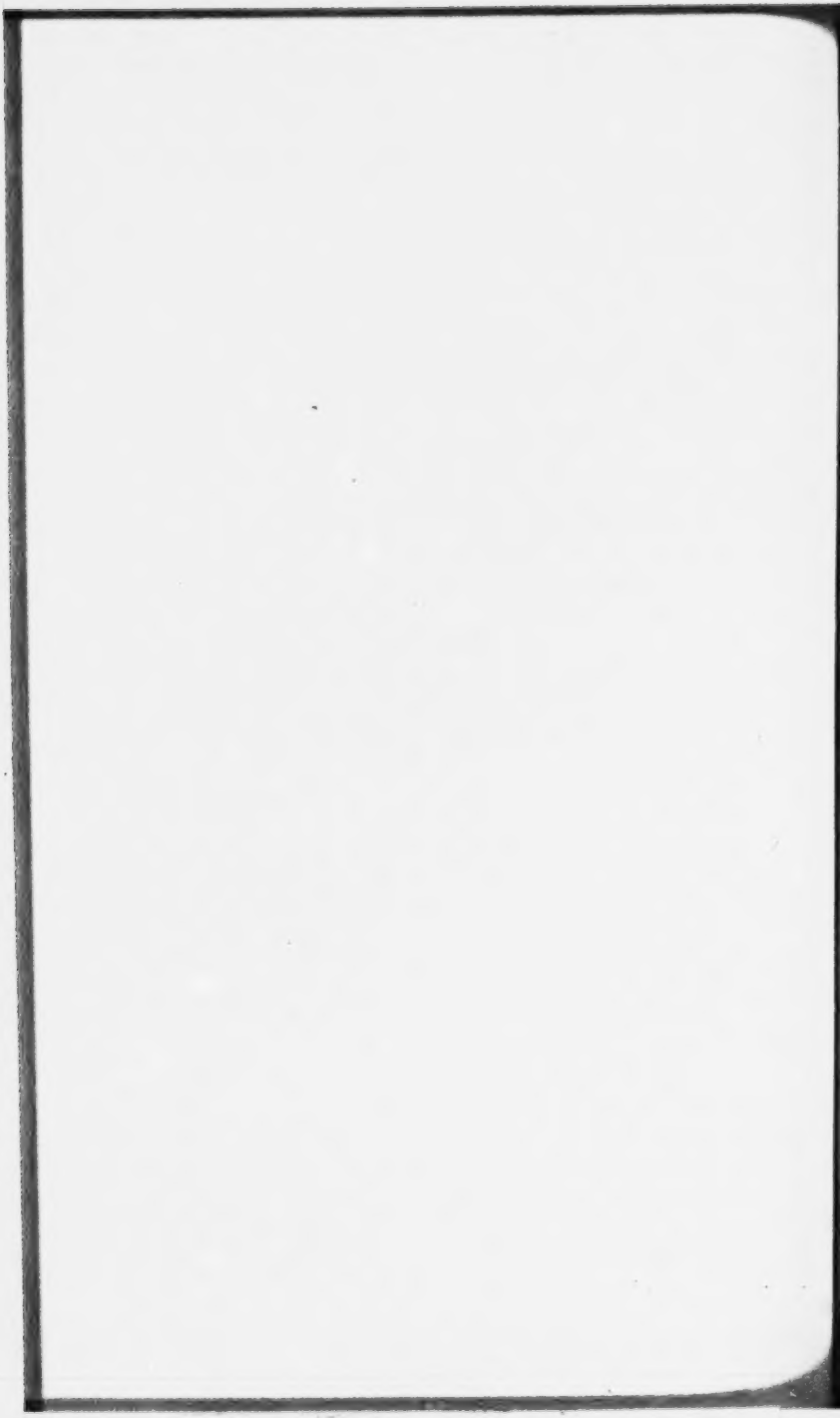

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 457

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, A CORPORATION; ROBERT BRIERLEY, HERBERT BEHLOW, AND HOWARD T. FRY, *Petitioners,*

v.

HEAVY, HIGHWAY, BUILDING AND CONSTRUCTION TEAMSTERS COMMITTEE FOR NORTHERN CALIFORNIA, AN UNINCORPORATED ASSOCIATION; J. R. WARD, CHAIRMAN THEREOF; WESTERN CONFERENCE OF TEAMSTERS, AN UNINCORPORATED ASSOCIATION; EINAR MOHN, PRESIDENT THEREOF, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO.

BRIEF FOR RESPONDENTS IN OPPOSITION

ARGUMENT

1. The petitioners herein seek review of the decision of the District Court of Appeal of the State of California in which the District Court of Appeal held:

The owner-operator clause in the present case cannot be distinguished from that in the *Oliver* case. Thus, as the subject matter of the contract concerns wages, hours and other terms and conditions of employment upon which federal law directs the parties to bargain, the respondent court has no jurisdiction to consider the cause. (*San*

> *Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 [79 S. Ct. 733, 3 L. Ed. 2d 775]; *Calise v. Superior Court*, 159 Cal. App. 2d 126, 132 [323 P. 2d 859].) The subject matter of the controversy is one which the United States Supreme Court has determined is in the area of exclusive federal jurisdiction. [Appendix B of Petition, pp. 54-55.]

The lower court thus expressly found that the owner-operator clause in the instant case is indistinguishable from the owner-operator provisions in *Local 24, International Brotherhood of Teamsters v. Revel Oliver*, 358 U.S. 283; 362 U.S. 605.[1]

The clause of the collective bargaining agreement at issue in this litigation (see Appendix C of Petition, pp. 58-64), is obviously modeled after, and has the same object as, the Article that was before this Court in the *Oliver* cases, *supra*. While less detailed, it is no different, except as to those changes resulting from the inherent differences between the construction industry and the over-the-road freight hauling industry. And what was said by this Court of the Article involved in *Oliver, supra*, 358 U.S. at 294 is equally applicable to the contract provisions presently before this Court:

> . . . This is thus but an instance . . . in which a union seeks to protect lawful employee interests against what is believed, *rightly or wrongly*, to be a "scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." *Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98, 99; 61 S. Ct. 122, 126; 85 L. Ed. 63 . . . the point of the Article is *obviously* not price fixing but wages. (Emphasis added.)

Nor is there any merit to petitioners' contention that the instant case can be distinguished from the first *Oliver* decision, *supra*, on the ground that the owner-drivers in *Oliver* were employees while here they are independent

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[1] Article XXXII of the Teamsters Central States Area Over-the-Road Motor Freight Agreement which was before this Court in the *Oliver* cases, *supra*, is set forth in an Appendix to the first *Oliver* decision, 358 U.S. at 322-26.

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contractors. In *U.S. v. Drum*, 368 U.S. 370, 382-383 n. 26, this Court stated:

> *Teamsters Union v. Oliver*, 358 U.S. 283, did not, as appellees suggest . . . hold that owner-operators are in any sense "employees." That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under § 8(d) of the National Labor Relations Act, 61 Stat. 142, 29 U.S.C. § 158(d), to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were "employees" protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. See *id.*, at 294-295.

Hence, it is clear that the status of the owner-operators is of no significance. Further the intent and effect of the contract clause in question is to change the status of the owner-operators from independent contractors to employees.

Respondents submit that the *Oliver* cases, *supra*, stand for the following propositions:

(a) the attempted resolution of the problems created by the impact of the use of owner-operators on a contractor's employees through the processes of collective bargaining may not be impeded by the application of inconsistent state policies in the area of restraint of trade; and

(b) the duty to bargain collectively concerning owner-operators and the rental of their equipment to contractors under these circumstances is an obligation imposed by Sections 8(a)(5), 8(b)(3) and 8(d) of the National Labor Relations Act, as amended, and bargaining on these subjects is a protected right of the employees of the contractors under Section 7 of the Act.

In the light of these holdings, an assumption of jurisdiction by the Courts of California would have been in derogation of the Supremacy Clause of the Constitution of the United States. The foregoing conclusion is reinforced by the decisions of this Court on certiorari to the Supreme Court of the State of California in *Garmon v. San Diego Bldg.*

Trades, 353 U.S. 263 and *Garmon v. San Diego Bldg. Trades*, 359 U.S. 236. Nor does petitioners' contention that the decision below forecloses petitioners from any remedy warrant consideration inasmuch as this Court stated in *Garmon II, supra* at 245-6:

> . . . the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598, 609. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss . . . .

Petitioners argue that without conducting a trial or taking additional testimony, the lower court could not determine that there was no state court jurisdiction over the subject matter of this suit. This Court has recognized "that it is not easy for a state court to decide, merely on the basis of a complaint and answer, whether the subject matter is the concern exclusively of the federal Board and withdrawn from the State." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481. Nevertheless this Court has held that where the conduct may be reasonably deemed to come within the protection afforded by the Wagner and Taft-Hartley Acts, the state court must decline jurisdiction. *Weber v. Anheuser-Busch, Inc., supra.* "The governing consideration is that to allow the states to control activities that are *potentially* subject to federal regulation involves too great a danger of conflict with national labor policy." *San Diego*

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Bldg. Trades Council v. Garmon, supra, 359 U. S. at 246. (Emphasis added.)

2. Petitioners' contention as to the failure of the lower court to look beyond the record before it does not state a ground for review since this Court will not assert its jurisdiction merely to review a decision of a state court upon a question of fact. The lower court's determinations that "[t]he owner-operator clause in the present case cannot be distinguished from that in the *Oliver* case . . ." and that "the subject matter of the contract concerns wages, hours and other terms and conditions of employment . . ." were sufficient to sustain the issuance of the peremptory writ of prohibition below, and no valid reason has been advanced to warrant review of these factual determinations. The court below stated with respect to the relevant California law governing prohibition:

> It is well settled that where the trial court has determined that it had jurisdiction, prohibition will lie to prevent exercise thereof when jurisdiction is challenged in that court by demurrer, motion, plea or other objection of some kind (*Harden v. Superior Court*, 44 Cal. 2d 630-634 [284 P. 2d 9]). The writ is a necessary and proper method of obtaining relief under the circumstances (*Tide Water Assoc. Oil Co. v. Superior Court*, 43 Cal. 2d 815-820 [279 P. 2d 35]). [Appendix B of Petition, p. 49.]

3. No conflict exists between the decision below and the decision of the Court of Appeals in *Jewel Tea Co., Inc. v. Local Unions, Etc., Amalgamated Meat Cutters & Butcher Workmen of North America*, 274 F.2d 217 (7th Cir.), cert. denied, 362 U.S. 936. *Jewel Tea, supra,* was an action brought in a United States district court under Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, 2, seeking relief from an alleged conspiracy between a trade association and a labor union to suppress competition by preventing the sale of meat products at retail establishments during evening hours. That case was thus concerned with the question of the applicability of the *federal* antitrust laws to labor unions and did not present an issue of *state* court jurisdiction over matters which are arguably

subject to the federal labor laws. Even if a conflict were to exist, the conflict would not be between a decision of a court of appeals and a highest state court since the California District Court of Appeal is not the highest state court of California.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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